*Together with No. 506, Brown et al. v. Irving Trust Co., Trustee in Bankruptcy.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC., PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF OLIVER A. OLSON, CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1933

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 53346.

In the Matter of Oliver A. Olson Co., Inc., Bankrupt

Proof of Claim

United States of America,
Southern District of New York, ss:

In the above district, in the County of New York, State of New York; on the date hereinafter set forth, came Samuel Levy and makes oath and says:

I am an officer of Manhattan Properties, Inc., a corporation duly organized under the laws of the State of New York. I reside in the Borough of Manhattan, City of New York. I am Treasurer of said corporation. The seal affixed hereto is the seal of said corporation and was so affixed by order of its Board of Directors and I have signed my name hereto by like order. Said corporation is the claimant.

The above-named bankrupt was at the time of the filing of the petition in bankruptcy herein and still is justly and truly indebted to the claimant in the sum of $26,558.93. The consideration of said debt is as follows: On or about De-
[fol. 2] cember 20, 1927, by a certain written agreement, one W. Stafford Reid, the then owner in fee of the premises commonly known as No. 907 Madison Avenue, as landlord, let unto the bankrupt and the said bankrupt hired from the said landlord, all those premises described as all of the store and the rear portion of the basement, as then divided and partitioned off and the parlor floor of the building situate in the Borough of Manhattan, City of New York, and known as No. 907 Madison Avenue, for the term of nine years eight months beginning at noon on the 1st day of February, 1928, and ending at 10 A. M. on the 1st day of October, 1937, at the yearly rent of $9,000.00 for the period to October 1, 1930, the yearly rent of $10,000 for the period to October 1, 1934, and the yearly rent of $11,000 for the

period to October 1, 1937, in equal monthly payments on the 1st day of each month in advance during said term. That said bankrupt entered into the possession of said demised premises pursuant to said written agreement.

That heretofore and on or about December 28, 1928, the aforedescribed premises commonly known as No. 907 Madison Avenue, were duly conveyed to Manhattan Properties, Inc., the above-named claimant, and the aforedescribed written agreement dated December 20, 1927, and the unexpired term thereof and the rent due and to become due thereunder, was duly transferred, assigned and set over unto said claimant, and that said bankrupt as tenant, duly attorned to said claimant as landlord.

That said bankrupt has failed to pay the rent for the months of February and March, 1932, which became due on [fol. 3] the 1st days of each respective month, each in the amount of $833.34, making a total sum due for rent for the months of February and March, 1932, in the amount of $1,666.68, except that the sum of $107.75 was received from the receiver for use and occupation, credit for which is hereby given.

That by the filing of the said petition in bankruptcy and the adjudication of the bankrupt as such, the bankrupt has breached his said written agreement and that the bankrupt is therefore indebted to the claimant in the sum of $25,000 as and for damages for said anticipatory breach of the said written agreement above referred to. That said sum of $25,000 damages is computed as follows: The total rent reserved under the terms of the said written agreement for the balance of the unexpired term, to-wit, five and one-half years, is the sum of $58,000. That the present rental value of said unexpired term is the sum of $33,000. The bankrupt is therefore indebted to the claimant in the sum of $25,000, representing the difference between such rent reserved and the rental value of the unexpired term, as aforesaid.

That the bankrupt is therefore indebted to the claimant in the total sum of $26,558.93.

That no part thereof has been paid.

That there are no offsets or counterclaims thereto. That the claimant has not, nor has any person for or on behalf of the claimant, to deponent's knowledge or belief, had or received, for the use or benefit of the claimant, any security

for said debt. That no judgment has been rendered therefor or for any part thereof. That no note or other evidence [fol. 4] of said debt has been received except as aforesaid.

Manhattan Properties, Inc., by Samuel Levy, Treasurer, 295 Fifth Ave., N. Y. C. (Seal.)

Subscribed, sworn to and acknowledged before me this 16th day of September, 1932, said subscriber being known to me as the person described in and who signed, swore to and acknowledged the above instrument. Sophie Goldenberg, Commissioner of Deeds. N. Y. Co. Cl'k's No. 82, Reg. No. 30 G 4. Bronx Co. Cl'k's No. 11, Reg. No. 34 G 11. Kings Co. Cl'k's No. 131, Reg. No. 4024. Commission expires March 29, 1934.

[fol. 5] AGREEMENT, DATED DECEMBER 20, 1927, ANNEXED TO PROOF OF CLAIM

This Indenture, made the Twentieth day of December, one thousand nine hundred and twenty-seven, between W. Stafford Reid, residing at 50 Vanderbilt Avenue, hereinafter called "Landlord", party of the first part, and Oliver A. Olson Company, Inc., a corporation organized under the laws of the State of New York, having its principal place of business at Numbers 2220-2226 Broadway, Borough of Manhattan, City of New York, hereinafter called "Tenant", party of the second part,

Witnesseth, that the Landlord has let unto the Tenant and the Tenant has hired from the Landlord all of the Store and the Rear Portion of the Basement, as now divided and partitioned off, and the Parlor Floor of the Building situate in the Borough of Manhattan, City of New York, and known as Number Nine Hundred and Seven (907) Madison Avenue, for the term of nine years, eight months, beginning at noon on the first day of February, 1928 and ending at 10 A. M. on the first day of October 1937, unless sooner terminated as hereinafter provided, the Tenant paying therefor unto the Landlord the yearly rate of nine thousand (9,000) dollars for the period to October 1, 1930, the yearly rate of ten thousand (10,000) dollars for the period to October 1, 1934, & the yearly rate of

eleven thousand (11,000) dollars for the period to October 1, 1937, as follows: $2,250 on the execution of this lease for the period to May 1st, 1928, and thereafter in equal monthly payments, to wit: on the first day of each month in advance in each and every year of the said term. [fol. 6] And the Tenant, for the Tenant and the Tenant's legal representatives and assigns, covenants and agrees with the Landlord, as follows:

First. That the Tenant will pay the said rent promptly when due.

Second. That the Tenant will also pay all charges assessed or imposed during said term upon the said premises for water as the same become due, and if not so paid, the Landlord may pay the same, and the amount so paid shall be considered as additional rent of said premises and payable forthwith.

Third. That the Tenant will not use, nor permit to be used, any part of the demised premises for any business or purpose other than the sale of furniture, and any and all articles of merchandise usually sold in first class department stores, the agreement by the Tenant as to the use of said premises being an inducement to the Landlord to grant this lease; that the Tenant will not assign or mortgage this lease, nor underlet any part of the said premises, nor use the roof of said building, obstruct the lights or skylights thereof, injure or disfigure the said building in any way or make any alterations therein, nor allow the same to be done, without first obtaining the written consent of the Landlord, nor permit to be displayed upon any part of said premises the sign of any real estate broker, or any other sign thereon except of a kind, size and style and in a location first approved of by the Landlord. If, and when, such consent shall be given, it shall not be construed to vest in the said Tenant any right in the exterior walls of said premises or the use thereof. The [fol. 7] Landlord also reserves the right to place upon the top or roof of said premises, or on the side or exterior walls thereof, any electric or other sign or signs for advertising purposes, and such rights shall belong solely and exclusively to the Landlord.

Fourth. That the Tenant during said term will at the Tenant's own cost and expense make all repairs to the

interior of said premises, and the appurtenances thereof, necessary to preserve them in good order and condition, except any repairs necessary in consequence of damage by fire, which said repairs shall be equal in quality and workmanship to the original work in said building, and that the Tenant, at the Tenant's own cost and expense, will replace all cracked and broken glass in any doors, windows, skylights and vaults of said premises, and will comply with and fulfill all laws, ordinances and requirements of all Municipal, State and Federal authorities, and all requirements or recommendations of the New York Fire Insurance Exchange or the New York Board of Fire Underwriters, applicable to said premises. If the Tenant fail to comply with any one or all of the provisions of this covenant, the Landlord is hereby authorized to comply therewith and to charge the cost thereof to the Tenant, and the amount so expended shall be considered as additional rent of said premises and collectible as such. Tenant shall not be obliged to make any change in the front of said building.

Fifth. That the Landlord shall not be liable for any damage or injury sustained by the Tenant or other person resulting from leakage of the roof or skylight or from breakage, leakage or obstruction of water, steam, soil or [fol. 8] gas pipes or fixtures or from any overflow, nor from electric wires, nor from carelessness, negligence or improper conduct on the part of any agent or employe; but if the Landlord shall neglect to repair the said roof or skylight within a reasonable time after a written notice of necessity for such repairs shall have been given, then the Tenant may cause the said roof or skylights to be repaired, and deduct the reasonable cost of such repairs from the rent of said premises.

Sixth. That the Tenant will allow the Landlord or the Landlord's agent at all times during usual business hours, or at any time in an emergency, to enter any part of the said premises for the purpose of inspection or for making repairs, alterations or improvements that may be deemed necessary or desirable by the Landlord or the Landlord's agents, or to comply with any violations against said premises or the building of which said premises form a part, or for showing the premises to any parties who may wish to

buy or lease the same; and six months next preceding the expiration of said term, will allow the usual notice of "To Let," and at any time during said term, the usual notice of "For Sale," to be placed upon the exterior walls or doorways of said demised premises and remain thereon without hindrance or molestation.

Seventh. That any notice to or demand upon the Tenant hereunder shall be sufficient if left on said premises or sent by ordinary or registered mail addressed to the Tenant at said premises.

Eighth. If the Tenant make default in the performance of any covenant herein contained, except the covenant for [fol. 9] the payment of rent and additional rent, the Landlord may immediately, or at any time thereafter, without notice, comply with the same for account of the Tenant.

Ninth. If a notice of mechanic's lien be filed against the demised premises or against premises of which the demised premises are part, for or purporting to be for labor or material furnished or alleged to have been furnished or to be furnished to or for the Tenant at the demised premises, or to or for some contractor hired by the Tenant, the Tenant will immediately remove the same, and if the Tenant fail to do so within fifteen days, the Landlord may, at the Landlord's option, either pay the same or cause the same to be removed at the Tenant's expense, and the amount of such payment or expense, and any expense of the Landlord in any lawsuit relating to such mechanic's lien, shall be deemed to be "additional rent" for the demised premises and shall thereupon become immediately due to the Landlord from the Tenant.

Tenth. The receipt by the Landlord of any installment of the regular stipulated rent hereunder or of any of said "additional rent" shall not be a waiver of any other "additional rent" then due. The Landlord shall have the same remedies and rights for the non-payment of any "additional rent" as the Landlord has for the non-payment of any of the regular rent first above specified. The failure of the Landlord to insist, in any one or more instances, upon a strict performance of any of the covenants of this lease, or to exercise any option herein contained, shall not be construed as a waiver or a relinquish-

ment for the future of such covenant or option, but the [fol. 10] same shall continue and remain in full force and effect. The receipt by the Landlord of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach and no waiver by the Landlord of any provision hereof shall be deemed to have been made unless expressed in writing and signed by the Landlord or the Landlord's duly authorized agent.

Eleventh. It is agreed that no employe of the Landlord or of the Landlord's agent has or shall hereafter have any power or authority to modify in any respect the terms of this lease, or to terminate the same, or to enter into any agreement for the Landlord in any way affecting the same, unless such authority shall be given by said Landlord or said Landlord's agent to such employe in writing and a copy thereof delivered to the Tenant; and it is further understood and agreed that no employe of the Landlord or of the Landlord's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and that a delivery of keys to any employe of the Landlord or of the Landlord's agent shall not operate in any way as a termination of the lease or a surrender of the premises. In the event of the Tenant at any time desiring to have the Landlord sublet the premises for the Tenant's account, the Landlord or the Landlord's agent is authorized to receive said keys for such purpose without releasing the Tenant from any of the Tenant's obligations under this lease. If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than the Tenant, the Landlord may collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, and no such collection shall be deemed a waiver of the cove- [fol. 11] nant herein against assignment and underletting, or the acceptance of the assignee, under-tenant or occupant as tenant, or a release of the Tenant from the further performance by the Tenant of the covenants herein contained on the part of the Tenant.

Twelfth. If there be any agreement between the Landlord and Tenant providing for the cancellation of this lease upon certain provisions or contingencies, and also an agreement for the renewal hereof at the expiration of the

term first above mentioned, the right to such renewal or the execution of a renewal agreement between the Landlord and Tenant prior to the expiration of such first mentioned term shall not be considered an extension thereof or a vested right in the Tenant to such further term, so as to prevent the Landlord from cancelling this lease and any such extension thereof during the remainder of the original term hereby granted; such privilege, if and when so exercised by the Landlord, shall cancel and terminate this lease and any such renewal or extension previously entered into between said Landlord and Tenant or the right of Tenant to any such renewal; any right herein contained on the part of the Landlord to cancel this lease shall continue during any extension or renewal hereof; any option on the part of the Tenant herein contained for an extension or renewal hereof shall not be deemed to give the Tenant any option for a further extension beyond the first renewal or extended term.

Thirteenth. The Landlord agrees to supply steam for heating said premises when necessary. Such steam shall be supplied on week days (legal holidays excepted) from [fol. 12] 8:00 A. M. to 10:00 P. M. If it becomes necessary or desirable to stop any of the machinery, apparatus, and appliances in said building by reason of accident or for the purpose of repair, alteration or improvement, or because of the inability of the Landlord to obtain fuel or power, said Landlord shall have the right to discontinue the service so long as said Landlord deems necessary or desirable for that purpose, and no claim for compensation or damages shall be made by the said Tenant, and the said Tenant hereby waives all claims for compensation and damages by reason thereof or inconvenience arising from said interruption of service. The Landlord shall not, in any event, be under any obligation to supply heat in the demised premises or the building in which said premises are located in any space beneath the level of the adjoining street.

Fourteenth. If the premises hereby rented be an entire building or a ground floor, the Tenant will at all times keep the sidewalk and gutter in front of said premises clean and free of ice and snow.

Fifteenth. If there be plate glass in said premises, the Tenant will, during the term of this lease, insure such

plate glass in the name and for the benefit of the Landlord, and pay the premium therefor, and *that* the policy for such insurance shall be forwarded by the Tenant to the Landlord, or the latter's agent, before the date of the commencement of this lease, and the Landlord, failing so to receive such policy, may insure said plate glass, the premium for which the Tenant hereby agrees to pay on demand.

[fol. 13] Sixteenth. If, through no fault or negligence of the Tenant, the said leased premises shall be partially damaged by fire or other casualty, the same shall be repaired with all reasonable speed at the expense of the Landlord, and if the damage be so extensive as to render the said premises untenantable or partially so, the rent shall be apportioned in proportion to the part of the premises that are still usable; but if the premises or the building of which the premises are a part shall be destroyed or damaged by fire or otherwise to such an extent as to render it necessary to rebuild the same, the rent shall be paid up to the time of such damage, and from then and thenceforth this lease and every renewal or extension thereof and the estate hereby granted shall cease and be cancelled.

Seventeenth. It is further convenanted and agreed that, if the whole or any part of said premises shall be taken by any City, County or State authority, or other authority, for any public purpose, then, from the day when possession of the part so taken shall be required and entered upon for such public purpose, this lease, and every extension thereof, and the estate hereby granted, shall cease, and become null, void and cancelled, and the rent shall be paid up to that date; and that if, by any such authority or by title paramount, the possession or use of any portion of or appurtenances to said building, such as vaults, show windows, stoops, porches, projections or any other thing or privilege, outside of the boundaries of the land owned by the Landlord, shall be discontinued, such discontinuance shall in no way affect the liability of the Tenant to pay the full rent reserved and to perform all of the other covenants, as herein or in any other lease or agreement with the [fol. 14] Landlord agreed to be paid, kept and performed

by the Tenant; and it is further covenanted and agreed that this lease shall be subordinate to any mortgage or mortgages which shall at any time be placed upon said premises or any part thereof, not exceeding in amount in the aggregate eighty per cent (80%) of the sales price in the event of a sale or eighty per cent (80%) of the value of the property containing the demised premises as fixed and determined by the appraisal of a reputable real estate appraiser who shall be a member of the Real Estate Board of New York, and that in the event of Landlord or any subsequent owner of the property desiring to place such mortgage or mortgages upon the property, tenant will sign, seal and deliver a consent and agreement in writing subordinating this lease to the lien of such mortgage or mortgages in form as may be required by the parties making the loan.

Tenant also covenants and agrees that he will at all times save landlord harmless of and from any claim, liability, loss, damage, suits, costs and expense arising under the Civil Damage Act, or other laws of the State of New York or of the United States, applicable to the use, gift or sale of intoxicating liquors upon the demised premises by tenant or any assignee or sub-tenant; or arising by reason of any alleged injury to persons or property which may be caused, or alleged to have been caused by or attributable to the neglect, carelessness, or improper conduct of tenant, his agents, employees, guests, assignees, or sub-tenants at the demised premises, or arising from the use and occupation thereof by virtue of this lease; or by reason of the breach of any rules, ordinances, or regulations of the Police, Building, Fire, Tenement House, or other Municipal [fol. 15] Departments of the City of New York, or of any department of the State of New York, affecting said premises, during the term of this lease, and tenant agrees to reimburse landlord for the reasonable cost and disbursements incurred by landlord in defending any and all suits that may be brought against landlord upon any such claim or claims; and will satisfy, pay and discharge any and all judgments that may be recovered against landlord in any such suit or suits.

It is covenanted and agreed that neither this lease, nor the term hereby demised, nor any part thereof, nor any right hereby vested in the tenant shall at any time be as-

signed or transferred in any manner whatsoever, unless the tenant shall deliver or cause to be delivered to the landlord an agreement in writing in and by which the assignee or transferee shall be obliged fully to perform all the terms, covenants, conditions and provisions of this lease. No assignment or transfer shall be valid for any purpose whatever until a duplicate original of such an agreement has been delivered to the landlord. No assignment or transfer shall in any manner whatsoever operate to relieve or release the tenant or any other person or corporation from any obligation hereunder.

It is further understood and agreed that if Mr. Oliver A. Olson and Mr. Walter W. McNeil shall give up the active management of the tenant's business, or if they shall have sold or transferred a majority of the shares of the capital stock of tenant, Landlord may require, in the event of either of said contingencies arising, that there shall be paid to him as security for the full and faithful performance of each and every one of the terms, covenants and [fol. 16] conditions of this lease by the tenant herein, a sum equal to three (3) months' rent then being paid currently. Tenant covenants and agrees that upon the happening of either of said contingencies, it will immediately give notice thereof to Landlord. In the event that either of the contingencies aforesaid shall have occurred, Landlord shall give notice in writing to Tenant that he demands the payment of the said sum to him as security and if the said sum shall not have been so paid to Landlord within thirty (30) Days after the giving of such notice, it is understood and agreed that the failure so to do shall constitute a default hereunder and thereupon Landlord or his agents may thereafter give notice in writing to Tenant that this lease and the term hereby granted shall be terminated on a day to be specified in such second notice, which shall not be less than thirty (30) days after the same shall have been given, and in any such event the term and estate hereby vested in the Tenant and any and all rights of the Tenant hereunder shall upon the day specified in said second notice, immediately cease and expire as fully as if the entire period herein provided for had elapsed and thereupon it shall and may be lawful for Landlord into the said demised premises to re-enter and repossess, hold and enjoy the same again as of his former estate and interest therein,

and remove all persons therefrom by summary proceedings or otherwise, anything herein contained to the contrary in anywise notwithstanding. The provisions of this paragraph are a limitation of the term of this lease. It is further understood and agreed that Landlord may require the payment of said sum to him as security as one of the conditions to the granting of consent to the assignment of this lease.

[fol. 17] It is further understood and agreed that if said security has been paid to Landlord and if no recourse to it shall be claimed by Landlord and if the Tenant shall not be in default in the performance of any of the terms, covenants, conditions and provisions of this lease, the Landlord shall at the expiration of the full term hereof, to wit: September 30, 1937, pay the said sum to the tenant. If said security or any part theerof shall be applied by the Landlord for the purpose of making good any default hereunder, the amount so applied on demand of the Landlord shall immediately be made good by the Tenant so that at all times until the expiration of the full term of this lease Tenant shall maintain unimpaired in the hands of Landord a sum equal to the amount originally deposited. Landlord shall pay to the Tenant interest on said sum or so much thereof as from time to time shall remain unapplied at the rate of three (3) per centum per annum, and said interest shall be paid by Landlord to tenant at the end of each calendar year of the term.

Provided always, nevertheless, that if default be made by the Tenant in the performanec of any covenant herein, except the covenant for the payment of rent or additional rent, or in the covenants of any other lease between the Landlord and Tenant, the Landlord, upon the happening of any such events, may give to the Tenant five days' notice of intention to end the term of this lease or any other lease between the Landlord and Tenant, and thereupon, at the expiration of said five days, the term of this lease and any and all other leases affecting the same Landlord and Tenant shall expire as fully and completely as if that day were the date herein or therein definitely fixed for the ex-

[fol. 18] piration of the term, and the Tenant will then quit and surrender to the Landlord the demised premises mentioned in this or any such lease; but the Tenant shall remain liable as herein provided, except that if the demised

premises be destroyed by fire or other casualty the foregoing provision shall not affect any other lease between the same Landlord and Tenant; or, if the Tenant make default in the payment of the rent reserved hereunder, or any part thereof, or in making any other payment herein provided for, or if the notice last above provided for shall have been given and said five days' period shall have elapsed, or if the Tenant abandon said premises, if said premises become vacant, if the Tenant becomes insolvent, if the Tenant make an assignment for the benefit of creditors, if bankruptcy proceedings be instituted by or against the Tenant, if a Receiver or Trustee of the Tenant's property be appointed, or if any similar event happen in respect to any other lease between the Landlord and the Tenant, then it shall be lawful for the Landlord, or the Landlord's agent, without notice, to re-enter said premises and every part thereof, either by ejectment, summary proceedings, personal entry. or otherwise, and remove all persons and property therefrom without being liable to indictment, prosecution, or damages therefor, and in the event of such re-entry or the cessation or cancellation of such estate, lease, renewal or extension, the Tenant, for the Tenant and for all persons claiming through or under the Tenant, hereby waives any and all right to redemption now or hereafter given by any law. The Landlord may, after obtaining possession of said premises, re-let the same or any part thereof as the agent of the Tenant for the whole or any part [fol. 19] of the term herein demised, from time to time, as the Landlord may deem best. In the event that the Landlord shall obtain possession by re-entry, dispossess, summary proceedings or otherwise, the Tenant hereby agrees to pay to the Landlord on demand the expense incurred by the Landlord in obtaining possession of said premises, including legal expenses and attorneys' fees, and to pay such other expenses as the Landlord may incur in putting the premises in good order and condition, and also any other expense or commissions which may be paid by the Landlord in and about the letting of the same. The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term

herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder. The Landlord may sue for and enforce the collection by law of such amount as above provided for which may be due at the expiration of each month, and the Tenant expressly agrees that any such suit shall not be a bar to or prejudice in any way the rights of the Landlord to enforce [fol. 20] the collection of the amount due at the end of any other future month by a like or similar proceeding. If said Tenant shall, at the date of the execution of this lease, be in possession of said premises under an existing lease, it is agreed that if the said lease under which said Tenant holds said premises shall for any cause be cancelled before its date of expiration, then this lease shall likewise, at the option of the Landlord, be void and of no effect.

And it is further covenanted and agreed that at 10 A. M. on the last day of the said term, or other sooner termination of the estate hereby granted, the Tenant shall and will peaceably and quietly leave, surrender and yield up unto the Landlord the said premises, and every part thereof, in as good a state and condition as they were in at the commencement of the said term, reasonable use and wear thereof; damages by fire, and the leakage of the roof, excepted.

Tenant shall furnish a water meter to measure consumption at the premises at his expense and keep the same in repair during the term.

If the nature of tenant's business causes an increase over existing fire insurance rate, increase of premium shall be paid by tenant as additional rent; Tenant also waives the right to more than one trial in any ejectment proceeding and it is understood that landlord makes no warranty of safety or suitability.

It is further covenanted and agreed that the tenant shall have the right, at the tenant's own cost and expense, to build an inside stairway connecting the store and parlor

floors of said building, such work to be done in accordance with the rules and regulations of all Departments having jurisdiction.

[fol. 21] The tenant furthermore covenants and agrees to use the tenant's own stairway as the means of communication between the store and parlor floors and shall use the present parlor floor entrances into the main hallway principally as fire emergency exits.

And landlord covenants and agrees that tenant on paying the rent herein reserved and performing all the conditions and covenants aforesaid shall and may peaceably and quietly have, hold, and enjoy the demised premises for the term aforesaid.

The provisions hereof shall apply to bind and enure to the benefit of the heirs, representatives, successors and assigns of the parties, provided, however, that no assignment by or through the tenant in violation of the provisions herein contained shall vest any right in the assignee thereunder, and that no assignment shall relieve the tenant from liability of any of the terms and agreements herein.

In Witness Whereof, the parties hereto have executed this instrument the day and year first above written.

W. Stafford Reid. Oliver A. Olson Company, Inc., by Oliver A. Olson, President. (L. S.)

In the presence of Norman C. Miller.

[fol. 22] State of New York,
County of New York, ss:

On this 21st day of December, 1927, before me personally came Oliver A. Olson, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the President of Oliver A. Olson Company, Inc., the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporaion, and that he signed his name thereto by like order.

Emily Krauss.

State of New York,
County of New York, ss:

On this 22nd day of December, 1927, before me personally came W. Stafford Reid, to me known and known to me to

be the individual described in and who executed the within instrument and he duly acknowledged that he executed the same.

Henry Leifheit, Notary Public. Queens County No. 993. Kings Co. Clerk No. 103; Reg. No. 8125. N. Y. Co. Clerk No. 108; Reg. No. 8201. Term expires Mar. 30, 1928.

[fol. 23] For Value Received, the undersigned hereby assigns, transfers and conveys the within lease to Emily Krauss, residing at 159 East 92nd Street, New York City.

W. Stafford Reid. (L. S.)

[fol. 24] In United States District Court

[Title omitted]

Notice of Hearing Before Referee

Sirs: Please take notice that a hearing will be held on the claim filed herein by Manhattan Properties, Inc., before Hon. Peter B. Olney, Jr., Referee, at his office at No. 19 Rector Street, in the Borough of Manhattan, City of New York, on the 16th day of November, 1932, at 10:30 o'clock in the forenoon of said day.

Dated November 10th, 1932.

Yours, etc., Arnstein & Levy, Attorneys for Manhattan Properties, Inc. Office & P. O. address: 295 Fifth Avenue, Borough of Manhattan, City of New York.

To Irving Trust Company, Trustee in Bankruptcy, One Wall Street, Borough of Manhattan, City of New York; Kaye, McDavitt & Scholer, Esqs., Attorneys for the Trustee, 149 Broadway, Borough of Manhattan, City of New York.

[fol. 25] In United States District Court

[Title omitted]

Order of Referee, Dated January 30, 1933

Manhattan Properties, Inc., having filed its claim in this proceeding in the principal sum of $26,558.93, consisting in

part of a claim for damages in the sum of $25,000 for breach of a lease between the claimant as landlord and the bankrupt as tenant, and the claimant having moved this court for permission to liquidate the same claim in so far as it seeks to recover damages as aforesaid, and said motion having duly come on to be heard on the 24th day of January, 1933, and Arnstein & Levy, Esqs., attorneys for Manhattan Properties Inc., having appeared in support thereof, and Kaye McDavitt & Scholer, Esqs., having appeared in opposition thereto, and it appearing from the fact of said claim that the claim for damages is for anticipatory breach of a lease of real property,

Now, on motion of Kaye, McDavitt & Scholer, attorneys for the Trustee, it is

Ordered that the application of said Manhattan Properties, Inc. for leave to liquidate its said claim be and the same hereby is denied, and it is further

[fol. 26] Ordered that so much of the said claim as seeks damages in the sum of $25,000 be and it hereby is expunged and disallowed; and it is further

Ordered that the said claim be and it hereby s reduced to and allowed in the sum of $1,558.93 without prejudice to any proceeding to reconsider the said claim which may be brought by the Trustee herein as and when the Trustee may be so advised.

Dated New York, January 30, 1933.

Peter B. Olney, Jr., Referee in Bankruptcy.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO REVIEW

To Hon. Peter B. Olney, Jr., Referee in Bankruptcy:

Your petitioner respectfully shows:

1. That it is a creditor of Oliver A. Olson Co. Inc., the above named bankrupt, and that its claim has been duly filed herein.

2. That in the course of the proceedings, on the 30th day of January, 1933, an order, a copy of which is hereto annexed, was made and entered herein and a copy thereof with notice of entry was mailed to Arnstein & Levy, attorneys for your petitioner, on February 4, 1933, and received by said attorneys on February 6, 1933.

3. That said order was and is erroneous in so far as it denied the application of your petitioner for leave to liquidate its claim and in so far as it expunged and disallowed so much of the said claim as seeks to recover the sum of $25,000.

4. Your petitioner respectfully excepts to the Referee's order in the foregoing connection and respectfully submits [fol. 28] that the Referee erred in making the same by reason of the fact that your petitioner's application for leave to liquidate the same should have been granted.

5. The action of the Referee is contrary to the law and is not based on the evidence.

6. The Referee erred in denying the application of your petitioner for leave to liquidate its claim.

7. The said Referee erred in expunging and disallowing so much of the claim as seeks to recover the sum of $25,000.

Wherefore your petitioner, aggrieved because of such order prays that the same be reviewed as provided in the Bankruptcy Act of 1898 and the amendment thereto and as provided in General Order XXVII.

Dated New York, February 14, 1933.

Manhattan Properties, Inc., Petitioner by Theodore Backer, President.

[fol. 29] *Duly sworn to by Theodore Backer. Jurat omitted in printing.*

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF REFEREE

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Peter B. Olney, Jr., Referee in charge of the above entitled matter, do hereby certify, pursuant to General Order XXVII as follows:

The question certified for review is whether I erred in making the order dated January 30, 1933, sought to be reviewed, in and by which I denied the application of petitioner for review to liquidate an alleged claim for damages for breach of a lease. The damages sought to be proved represent the difference between the aggregate rent reserved in a lease expiring in 1937 and the alleged present rental value of the premises. I denied the motion on the ground that said alleged damages could not be proved in bankruptcy under the decision of Judge Knox re Schulte United, Inc. in Bankruptcy No. 50355 handed down May 21, 1932.

There is submitted herewith proof of claim of petitioner for review, petition for review verified February 14, 1933, and the stenographic minutes of the proceedings before me [fol. 31] on said motion. No separate memorandum was made by me in deciding this motion.

Dated New York, February 16th, 1933.

Respectfully submitted.

Peter B. Olney, Jr., Referee.

Hearing on the above will be on the bankruptcy motion calendar in the District Court on Thursday, February 23, 1933.

Peter B. Olney, Jr., Referee.

Mr. Fierman: The next is the claim of the Manhattan Properties.

(Claimant represented by Ornstein & Levy, attorneys, by Mr. Levinson, of counsel.)

Mr. Fierman: The trustee admits there is back rent which is due of $1,558.93. The balance of the claim is for future rent which they call damages. They compute their damages at $25,000.

The Referee: How do you get away from Judge Knox's Schulte-United case?

Mr. Levinson: The lease in this case contains the provision if bankruptcy proceedings be executed by or against the tenant then it shall be lawful for the landlord or the landlord's agent to re-enter such premises, et cetera. We say under a fair construction of that lease there became an

anticipatory breach of the lease and we are not asking for [fol. 32] rent at all, we are asking for damages. I do not think the Schulte-United case applies to this case. There is one case similar, and that is the Roth & Apfel case, which is easily distinguishable from our case, I believe.

The Referee: Insofar as this claim is based upon damages by reason of the breach of the covenant of the lease, being the difference between the rental value of the premises and the rent reserved in the lease; it is, in my opinion, not provable in bankruptcy, under the decision of Judge Knox in Schulte-United, Inc., Bankruptcy No. 50,355, handed down May 21st, 1932 and, therefore, the application to liquidate the claim in that respect must be denied and the claim allowed merely for the amount of indebtedness which was actually owing at the time of the filing of the petition, which is $1,558.93.

Mr. Levinson: Of course I reserve my right to prove my claim if it is later legally found I have a right to do so.

The Referee: Of course.

Mr. Levinson: I will take an exception, your Honor.

The Referee: All right, you may enter an order.

Peter B. Olney, Jr., Referee.

[fol. 33] In United States District Court, Southern New York

Present: Hon. Alfred E. Coxe, D. J.

In the Matter of Oliver A. Olson Co., Inc., Bankrupt

Order Appealed From—March 15, 1933

Manhattan Properties, Inc., having filed its claim in this proceeding, and having thereafter moved before the Honorable Referee for an order liquidating so much of its said claim as requests damages in the sum of Twenty-five thousand ($25,000) dollars for breach of a lease of real property between the claimant as landlord, and the bankrupt as tenant, and the said referee having expunged that part of the claim which claimant sought to have liquidated on the ground that the said claim for damages was contingent and could not be proved against the bankrupt estate:

And the said claimant having petitioned this court to review the said order of the referee which expunged and struck out so much of the claim of the said petition as requested damages as aforesaid, and the said referee having certified the question for review to this court pursuant [fol. 34] to General Order XXVII, and motion having been brought thereon before this court on the 8th day of March, 1933.

Now, on reading the duly verified claim of Manhattan Properties, Inc., and the exhibits thereto annexed and made a part thereof, and the order of the referee herein dated January 30, 1933, and the duly verified petition to review the said order, and the certificate of the referee dated February 16, 1933, and after hearing Arnstein & Levy, attorneys for the said petitioner, for the motion and Kaye, McDavitt & Scholer, attorneys for the Trustee, in opposition thereto, and due deliberation having been had thereon, and on filing a memorandum of the court, it is

Ordered that the order of Honorable Peter B. Olney, Jr., Referee in Bankruptcy, be and it hereby is in all respects confirmed.

Alfred E. Coxe, U. S. D. J.

[fol. 35] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the undersigned hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order entered in the office of the Clerk of the United States District Court for the Southern District of New York on March 15, 1933, confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, and from each and every part of said order.

Dated March 27, 1933.

Yours, etc., Manhattan Properties, Inc., Petitioner, by Arnstein & Levy, Attorneys for Petitioner. Office & P. O. address: 295 Fifth Avenue, Borough of Manhattan, City of New York.

To Kaye, McDavitt & Scholer, Esqs., Attorneys for Trustee, 149 Broadway, Borough of Manhattan, City of New York.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Manhattan Properties, Inc., feeling itself aggrieved by the order entered in the above entitled proceeding in the office of the Clerk of this Court on the 15th day of March, 1933, confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, expunging and disallowing that part of the claim amounting to $25,000 for breach of a lease of real property between petitioner as landlord and the bankrupt as tenant and denying petitioner's application for leave to liquidate its claim for damages, does hereby appeal from said order and from each and every part thereof to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the Assignment of Error, which is filed herewith, and prays for an order allowing the said petitioner to prosecute said appeal and that a transcript of the record and proceedings on which said order is made may be duly authenticated and sent to the United States Circuit Court of Appeals, for the Second Circuit, and that a citation be issued directed to the Irving Trust Company, as Trustee in Bankruptcy of the estate of the above named bankrupt commanding it to appear before the United States Circuit Court of Appeals, for the Second [fol. 37] Circuit, to do and receive what may appertain in justice to be done in the premises.

Dated March 28, 1933.

Manhattan Properties, Inc., Petitioner, by Arnstein & Levy, Attorneys for Petitioner. Office & P. O. address: 295 Fifth Avenue, Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The forgoing appeal from the order entered herein on March 15, 1933 be and the same hereby is allowed.

Dated March 29th, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Manhattan Properties, Inc., feeling itself aggrieved by the order entered herein on March 15, 1933 now appears by its attorneys and presents with its notice of appeal the following assignments of error:

1. That the Court erred in confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated January 30, 1933, denying petitioner's motion to liquidate its claim for damages for breach of a lease.

2. That said order was and is erroneous insofar as it confirmed the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, denying the application of the petitioner for leave to liquidate its claim and expunging and disallowing so much of the claim as seeks to recover the sum of $25,000.

3. That said order was and is erroneous in that it was and is contrary to the law and is not based on the evidence.

Wherefore, petitioner prays that the said order be reversed and that the District Court of the United States, [fol. 39] for the Southern District of New York be directed to enter an order reversing its order and reversing the decision of the Referee and allowing the claim of the petitioner and directing liquidation of the same.

Dated March 27, 1933.

Manhattan Properties, Inc., Petitioner, by Arnstein & Levy, Attorneys for Petitioner. Office & P. O. address: 295 Fifth Avenue, Manhattan, New York City.

[fol. 40] Citation, in usual form, omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April —, 1933.

Arnstein & Levy, Attorneys for Appellant. Kaye, McDavitt & Scholer, Attorneys for Appellee.

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 465

Argued June 9, 1933. Decided July 17, 1933

MANHATTAN PROPERTIES, INC., Appellant,

v.

IRVING TRUST COMPANY, Trustee, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal by a creditor from an order in bankruptcy of the District Court for the Southern District of New York expunging its claim against the trustee.

Maurice J. Bricker, for appellant.
Harold L. Fierman, of New York City, for appellee.

L. HAND, Circuit Judge:

This case involves the validity of a claim in bankruptcy by a lessor against a bankrupt estate for rent due after petition filed. The referee and judge expunged the claim and the lessor appealed. The bankrupt, a corporation, had leased from the creditor premises in New York in which its business was carried on. The lease provided that upon default in any covenant, including the payment of rent, the lessor might re-enter and repossess himself of the premises, in which case the lessee promised "to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord." Upon the bankruptcy, one of the conditions of re-entry, the lessor re-entered and filed a claim for the difference between the aggregate installments of future rent and the present value of the balance

of the term. The claim was expunged on the authority of our decision in Re Roth & Appel, 181 F. 667, 31 L. R. A. (N. S.) 270, which the appeal is an effort to induce us to overrule.

The Bankruptcy Act of 1841 (5 Stat. 440, 444) allowed proof of contingent claims, section 5, and in Bosler v. Kuhn, 8 Watts & S. (Pa.) 183, the question came up of whether future installments of a ground-rent were provable. The Supreme Court of Pennsylvania held that they were not, since the land was the debtor, and the liability could not be regarded as an annuity, which was one of the claims expressly provided for by the act. In Savory v. Stocking, 4 Cush. (Mass.) 607, the claim was not allowed because future rent was not a debt in existence upon petition filed. In both cases apparently there had been no covenant to pay rent. The Act of 1867 (14 Stat. 517) also provided for contingent claims, but expressly dealt with rent, Rev. St. § 5071, and this, coupled with Rev. St. § 5072, was held to bar future rents in Bailey v. Loeb, Fed. Cas. No. 739, 11 N. B. R. 271, and In re May, Fed. Cas. No. 9,325, 9 N. B. R. 419. Independently of these sections (section 19 of the Act), Judge Lowell held in Ex parte Houghton, Fed. Cas. No. 6,725, 1 Lowell 554, that future rent was not provable, because it was not a present debt, though the lease contained a covenant to pay it. This he followed in Ex parte Lake, Fed. Cas. No. 7,991, 2 Lowell 544, in a case where the lessee had in addition covenanted to indemnify the lessor seriatim in case of re-entry for breach of condition. Ex parte Houghton may be explained on the theory that rent ceased on re-entry—the lessor having re-entered—but Ex parte Lake must stand for a ruling that future rents are not provable, though the reason is not clear, except perhaps on historical grounds. When the situation came before us in Re Roth & Appel, 181 F. 667, 31 L. R. A. (N. S.) 270, under a lease like that at bar, we disallowed the claim. The ground for our action was that section 63 (a) (4), 11 U. S. C. A., § 103 (a) (4), incorporated the phrase, "absolutely owing," of section 63 (a) (1), 11 U. S. C. A., § 103 (a) (1), and that the claim was contingent because, upon petition filed, it was uncertain whether the lessor would re-enter at all, and again, whether if he did, there would be any loss, and, if so, how much. Our interpretation of section 63 (a) (4) has now been ex-

pressly overruled in Maynard v. Elliott, 283 U. S. 273, 51 S. Ct. 390, 75 L. Ed. 1028, and our decision must rest upon the ground that, though the contingency of the claim is no objection to its proof, it is practically too uncertain to be liquidated. That had been held, for instance, in Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232, under the Act of 1867, and, in Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084, under that of 1898. In Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309, the amount was fixed and the uncertainty of the incidence was not thought too great; in Maynard v. Elliott, both were held certain enough. Obviously, in these respects each case must stand by itself.

The law, as we now understand it, is therefore that a contingent claim may in general be proved, provided its liquidation does not involve too speculative considerations, confessedly a variable standard. Among these will be the ability of the claimant himself to control the contingency. Moreover, the whole subject has taken on a new aspect from Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. The uncertainties attendant upon any future installments were as great as in the case of a covenant to pay rent under a lease. Moreover, in Maynard v. Elliott, though the maker of the note in fact became insolvent before petition filed, and thus the liability of the indorser might have then been calculated, this was not mentioned, or even alluded to, in the opinion. Perhaps it was assumed that his default would certainly be decided before the bankrupt estate was fully administered, and that liquidation could thus take place in time for distribution. Indeed, it would otherwise be hard to find an instance in which the amount of the claim could be more uncertain. In Moch v. Market Street National Bank, 107 F. 897 (C. C. A. 3), and in Re Semmer Glass Co., 135 F. 77 (C. C. A. 2), it appears to have been assumed that the solvency of the maker would be determined in season. When that is so, no practical difficulty arises. But, in Re Merrill & Baker, 186 F. 312 (C. C. A. 2), there appears to have been no obstacle to such a liquidation of the claim, and no reason to take a different view from In re Semmer Glass Co., though we did. Again in Re Mullings Clothing Co., 238 F. 58, L. R. A. 1918A, 539 (C. C. A. 2), we allowed a claim for future rent

in a situation like In re Roth & Appel, except that the bankrupt had repudiated a contract to accept a lease before petition filed. This did indeed avoid the objection that the claim was contingent in form, but the uncertainty as to its amount, or indeed whether there would be any loss at all, was quite the same. Finally in Re Marshall's Garage, 63 F. (2d) 759 (C. C. A. 2), we accepted the present valuation of land as a permissible subtrahend for calculating damages on a breach of contract to buy five years later. The uncertainty as to the future value of a fee is no less great than as to the value of sequent terms. In that case we observed that it is the practice in cases of anticipatory breach, when the trial comes on before the period of performance has arrived, to forecast its value by the best means at hand. Cf. N. Y. Trust Co. v. Island Oil & T. Co., 34 F. (2d) 653, 654 (C. C. A. 2). And in bankruptcy, if an employer makes anticipatory breach of a future contract, the employee's earning power may be calculated in spite of the uncertainty as to its amount, or as to his continued life and health. In re Schultz & Guthrie (D. C.), 235 F. 907. The same is true of commercial contracts. In re Stern, 116 F. 604 (C. C. A. 2). See, too, In re Portage Rubber Co., 296 F. 289 (C. C. A. 6), although the court did not notice the full scope of its ruling.

On the other hand, the doctrine in Re Roth & Appel, supra (C. C. A.) 181 F. 667, 31 L. R. A. (N. S.) 270, is the law in five other circuits, Slocum v. Soliday, 183 F. 410 (C. C. A. 1); McDonnell v. Woods, 298 F. 434, 437 (C. C. A. 1); Trust Co. of Ga. v. Whitehall Holding Co., 53 F. (2d) 635 (C. C. A. 5); Atkins v. Wilcox, 105 F. 595, 53 L. R. A. 118 (C. C. A. 5); Wells v. Twenty-first St. Realty Co., 12 F. (2d) 237 (C. C. A. 6); Britton v. Western Iowa Co., 9 F. (2d) 488, 489, 45 A. L. R. 711 (C. C. A. 8); Watson v. Merrill, 136 F. 359, 69 L. R. A. 719 (C. C. A. 8); Colman Co. v. Withoft, 195 F. 250 (C. C. A. 9). The rule in the Third and Seventh circuits is otherwise. In re Keith-Gara Co. (D. C.) 203 F. 585, affirmed 213 F. 450 (C. C. A. 3); In re Chakos, 24 F. (2d) 482 (C. C. A. 7). Furthermore the Supreme Court gave apparent approval to In re Roth & Appel, supra (C. C. A.) 181 F. 667, 31 L. R. A. (N. S.) 270, in Central Trust Co. v. Chicago Auditorium, supra, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, and Filene's Sons Co. v. Weed, 245 U. S. 597, 38 S. Ct. 211, 62 L. Ed.

497, and to Atkins v. Wilcox, supra (C. C. A.) 105 F. 595, 53 L. R. A. 118, in Maynard v. Elliott, supra, 283 U. S. 273, 51 S. Ct. 390, 75 L. Ed. 1028. Again, whatever may be said of the consistency of the ruling, In re Mullings Clothing Co., supra (C. C. A.) 238 F. 58, L. R. A. 1918A, 539, professed to leave the doctrine untouched, as did In re Marshall's Garage, supra (C. C. A.) 63 F. (2d) 759, 762. Finally, although the Bankruptcy Act has been since twice amended, Congress has made no change in this feature. Indeed as we shall show, it changed the law in this precise respect in one situation, but did not do so in this. For these reasons my brothers believe that it has become the settled law of this circuit and that we should adhere to it. For myself, while I recognize the force of this application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer, but the fluctuations are less rapid. Some chances must be taken, but that is often so.

There remains only the question whether the Act of March 3, 1933 (11 U. S. C. A. § 201 et seq.), has made a change in the law, assuming without deciding that it applies to pending proceedings. The sentence concluding section 74 (a), 11 U. S. C. A. § 202 (a), standing alone, would be enough to justify the proof of such claims, but the section itself is of very limited scope. It applies only to individuals, and occurs in a statute providing only for compositions and moratoriums. The sole color for saying that it should not be confined by its association is that it is redundant, because both "debts" and "creditors" are already so defined as to include claims "for future rent." Literally indeed, in each case the definition extends only to moratoriums, not to compositions, and it is just conceivable that this may give the concluding sentence a function. Congress might have feared the omission, and provided against it out of abundant caution. We rely, however, upon the fact that, as it stands, it is in a context limited as we have said; if the purpose was to give general provability to such claims, we cannot conceive that it would have been tucked in at the end of such a section. Its origin appears from the

debates. It was introduced on the floor of the Senate, apparently only for caution. Objection was made by the chairman of the steering committee on the ground that no change was contemplated in the existing act. Upon this the proposer withdrew it temporarily, assenting to the chairman's declared purpose. Why it was again introduced and then accepted does not appear, but the claimant asks us to suppose that it must have been because of a change in intent which then countenanced amendments to the general act. This is a most tenuous inference; it is by far more likely that it was to lay any possible doubts, its original purpose. At any rate, if the intent was broader, the language has too well concealed it; and we hold the sentence does not cover the situation at bar.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of OLIVER A. OLSON CO., INC., Bankrupt; MANHATTAN PROPERTIES, INC., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Oliver A. Olson Co., Inc. Order for

mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 47, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of In the Matter of Oliver A. Olson Co., Inc., Bankrupt; Manhattan Properties, Inc., Appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of September, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 50] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed November 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,108. U. S. Circuit Court of Appeals, Second Circuit. Term No. 505. Manhattan Properties, Inc., petitioner, vs. Irving Trust Company, as trustee in bankruptcy of Oliver A. Olsen Co., Inc. Petition for a writ of certiorari and exhibit thereto. Filed October 5, 1933. No. 505, O. T., 1933.

(4252)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD, AND HUGH MILLARD, PETITIONERS,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF UNITED CIGAR STORES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt; Samuel R. Brown, Almira B. Millard, Alfred Millard, and Hugh Millard, Petitioners-Appellants; Irving Trust Company, as Trustee in Bankruptcy, Appellee

STATEMENT OF CASE

This proceeding was commenced in the United States District Court for the Southern District of New York on August 29, 1932, by the filing of a voluntary petition for adjudication in bankruptcy by United Cigar Stores Company of America, a New Jersey corporation. On the same day said corporation was adjudicated a bankrupt, and Irving Trust Company was appointed Receiver in Bankruptcy. On September 10, 1932, said Irving Trust Company was [fol. 2] elected Trustee in Bankruptcy. The Referee to whom this matter was referred is the Honorable Irwin Kurtz.

On January 13, 1933, a proof of claim was filed on behalf of the above-named petitioners-appellants and an amended proof of claim was filed by said petitioners on April 5, 1933.

On February 28, 1933, petitioners filed and served their petition and notice of motion to liquidate said claim. On March 8, 1933, the Trustee filed and served its petition to expunge said claim, together with an order to show cause. Said applications came on to be heard before the Referee on March 13, 1933, and on the 26th day of April, 1933, an order of the Referee was made and entered, denying petitioners' petition to liquidate said claim and the same was disallowed, rejected and expunged and it was ordered that no dividend be paid thereon. On April 29, 1933, the petitioners filed a petition for review and, pursuant thereto, the Referee, on May 1, 1933, transmitted his certificate to the United States District Court. The same came on to be heard on May 3, 1933, and by order made and entered May 3, 1933, the order of the Referee was affirmed and the petition to review denied and dismissed.

No parties have been arrested and no property attached. The bankrupt estate is in possession of the trustee in bankruptcy.

Final decree affirming the Referee's order, denying the petition to review and dismissing the same was entered on May 3, 1933. This appeal was taken on May 5, 1933.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

PROOF OF CLAIM

UNITED STATES OF AMERICA,
State of Nebraska,
District of Nebraska, ss:

At Omaha in the District of Nebraska, on the 10th day of January, 1932, came Winthrop B. Lane of Omaha, in the County of Douglas and State of Nebraska, attorney for Samuel R. Brown of Los Angeles, County of Los Angeles, State of California, Almira B. Millard of Los Angeles, County of Los Angeles, State of California, Alfred Millard of Los Angeles, County of Los Angeles, State of California, and Hugh Millard of the City of Madrid, Republic of Spain, and made oath and says that United Cigar Stores Company of America, a New Jersey corporation, who is the person by whom a petition for adjudication of bankruptcy has been filed and who has been duly adjudicated a bankrupt, is justly and truly indebted to the said Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, in the sum of ($143,615.80). That the consideration of said debt is as follows:

Samuel R. Brown is the successor by devolution of the 6/12th interest of Samuel A. R. Brown in the south ¾ of [fol. 4] Lot 8, Block 119, and the east ⅓ of Lot 7, Block 119, being 88 feet on Farnam Street and 99 feet on 14th Street, situated at the northwest corner of Farnam and 14th Streets, and being known as and by the street numbers 1402-4-6-8 Farnam Street and 218 14th Street in the

City of Omaha, County of Douglas, State of Nebraska, together with all buildings and improvements thereon and appurtenances thereto.

Almira B. Millard is the owner of a 4/12th interest in said property.

Alfred Millard is the owner of a 1/12th interest in said property.

Hugh Millard is the owner of a 1/12th interest in said property.

On June 14th, 1920, Almira Millard owned a 6/12th interest in said property of which she thereafter conveyed a 1/12th interest each to Alfred Millard and Hugh Millard.

On June 14, 1920, Samuel A. R. Brown owned a 6/12th interest in said property, to which Samuel R. Brown has succeeded as aforesaid.

On June 14th, 1920, Samuel A. R. Brown and Almira Millard, by an indenture of that date, demised said property to the above bankrupt, its successors and assigns, for the term commencing July 1, 1920, and expiring June 30, 1945, at a rent which for the period from July 1, 1924, to June 30, 1945, was to be $20,000 annually, payable in equal monthly payments in advance on the first day of each and every month during the term. Said indenture of lease also provided as follows:

"Provided also, and these presents are upon this covenant, that if the Lessee (meaning the above bankrupt) do [fol. 5] or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding

breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

On August 29, 1932, the above bankrupt was adjudicated a bankrupt by the United States District Court for the Southern District of New York.

On September 10, 1932, Irving Trust Company, a corporation organized and existing under the laws of the State [fol. 6] of New York, was duly elected Trustee in Bankruptcy of the above bankrupt.

On November 23, 1932, the said Trustee rejected the Indenture of Lease of said property.

Thereafter and on November 26, 1932, claimants, after due notice to the said Trustee and to the above bankrupt, duly entered upon the said property and the lease thereupon determined.

The loss of rent incurred by the tenants by reason of such termination during the residue of the term above specified is $140,615.80. The arrears of rent unpaid at the time of said rejection by the said Trustee was $3,000. Said losses are determined as follows: The rent stipulated in the lease was $20,000 per annum after the payment of all taxes and charges. The property has a rental value for the remainder of the term of $5,000 annually in taxes and charges. The loss to claimants is therefore $15,000 annually from November 26, 1932, until June 30, 1945. The present value of said sum, discounted at 5% annually, is $140,615.80. The arrears of rent at the time of said re-entry was $3,000, but said sum is liable to be diminished if claimants are able to collect from users and occupiers of the said premises from September 1, 1932, to November 26, 1932, or from the said Trustee or otherwise, any sums as rent.

That no part of said debt has been paid except (whatever rent has been collected) and that this deponent has not nor has any person by his order or to this deponent's knowledge or belief, for claimant's use, had or received any manner of security for said debt whatever, and this de- [fol. 7] ponent further says that this deposition cannot be made by the claimants in person because the claimants are

located in distant cities and are unfamiliar with the facts except as informed by deponent, and that he is duly authorized by his principals to make this affidavit and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt to the best of his knowledge and belief still remains unpaid and unsatisfied.

Samuel R. Brown, Almira B. Millard, Alfred Millard, Hugh Millard, by Winthrow B. Lane, Their Attorney.

Subscribed and sworn to before me this 10th day of January, 1933. Paul L. Martin, Notary Public. (Seal.)

EXHIBIT A TO PROOF OF CLAIM

By this indenture, executed this 14th day of June, 1920, in consideration of the rent and covenants herein reserved and contained, entered into by the parties hereto for themselves, their respective heirs, administrators, successors, legal representatives and assigns, Samuel A. R. Brown residing at Omaha, Nebraska, and Almira B. Millard residing at Omaha, Nebraska, hereinafter jointly, severally and collectively called the Lessor, City of Omaha, State of Ne-
[fol. 8] braska, doth lease and demise unto United Cigar Stores Company of America, incorporation under the laws of the State of New Jersey having an office at No. 44 West 18th Street, City of New York, hereinafter called the Lessee, South ¾ of Lot 8, Block 119 and the East ⅓ of Lot 7, Block 119, together with all buildings and improvements thereon erected being eighty-eight (88) feet on Farnam Street and ninety-nine (99) feet on Fourteenth Street, situated at the Northwest corner of Farnam and Fourteenth Streets, and being known as and by the street numbers 1402-4-6 and 8 Farnam Street and 218-20 Fourteenth Street, in the City of Omaha, County of Douglas, State of Nebraska, with the appurtenances, to be used as a cigar store, and for the sale of such sundry merchandise as is or may be dealt in generally by Lessee.

To have and to hold the premises hereby demised unto the Lessee, its successors and assigns for the term commencing July 1st, 1920, and expiring June 30th, 1945.

Yielding and paying therefor the yearly rent of Eighteen thousand ($18,000) Dollars from July 1st, 1920, to June 30th, 1922, the yearly rent of Nineteen thousand ($19,000) Dollars from July 1st, 1922, to June 30th, 1924, and the yearly rent of Twenty thousand ($20,000) Dollars from July 1st, 1924, to June 30th, 1945, payable in equal monthly payments in advance on the first day of each and every month during the term.

And the Lessee does hereby covenant with the Lessor, that the Lessee, during the said term will pay to the Lessor, the said rent at the times and in the manner aforesaid and [fol. 9] will keep the said premises in as good order and repair as when delivered to it, damage by fire or other casualty or happening excepted; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, but provided that in the event that any of said glass shall be broken or damaged by any cause before the commencement of the term herein demised, the same shall be replaced at the expense of the Lessor, and at the expiration of the term the Lessee will remove its goods and effects, and will peaceably yield up to the Lessor, the said premises, in as good order and repair as when delivered to it, damage by fire, casualty or act on the part of any governmental authority, ordinary wear and tear and damage by the elements excepted.

That the Lessee will not assign this lease without the written consent of the lessor but may sublet the demised premises or any part thereof for any lawful business which shall not be extra hazardous on account of fire.

That during the term the Lessee will not consent that said premises be overloaded or damaged, or that any trade or occupation shall be carried on upon the said premises or any use made thereof which shall be unlawful or contrary to any law of the State or ordinance or by-law of the City for the time being in force; that no act or thing shall be persisted in upon the said premises which will make void or voidable any insurance on the said premises or building against fire, and the Lessee shall have the right to make alterations, changes and improvements to and remodel the premises, inside and outside, at its own expense, provided that the work thereof shall be done in conformity with the building laws of the City, County and State; that no addi-

[fol. 10] tion or alteration to or upon the said premises shall be made which will endanger the safety of the building, and the Lessor covenants and agrees upon demand at any time after the execution of this lease to properly execute or cause to be properly executed, and deliver to the Lessee all applications, consents and other instruments, which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing such alterations, changes, improvements and remodeling.

That the Lessor may during the term at reasonable times enter to view the premises and may show the said premises and building to others, and at any time within three months next before expiration of the said term may affix to any suitable part of the said premises a notice for letting or selling the premises, or building, and keep the same affixed without hindrance or molestation.

Provided also, and these presents are upon this covenant, that if the Lessee [meaning the above bankrupt] do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under [fol. 11] and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified.

All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the Lessor or to one of the executive officers of the

Lessee or shall be sent by registered mail addressed to the party intended to be notified at its last known post office address and notice given as aforesaid shall be a sufficient service thereof.

Rider

The lessee further covenants and agrees to pay in addition to the rent hereinabove reserved, all real estate taxes and water charges assessed against the demised premises within thirty days after the same shall become due and payable but nothing herein contained shall be deemed to require the lessee to pay any income, rent, inheritance and/or other taxes except such as are assessed or imposed against the real estate.

The lessee shall have the right to contest or review by legal proceedings or in such other manner as it deems suitable, which proceedings, if instituted, shall be conducted promptly at its own expense and free of expense to the lessors (but lessors covenant and agree to join in such applications, if required by law, requirements, regulations or authorities wherein premises are located), any taxes or [fol. 12] water rates imposed upon or against the parcel of land or buildings or improvements thereon above described, and in case any such taxes or water rates shall, as a result of any such proceedings or otherwise be reduced, cancelled, set aside or to any extent discharged and upon the determination of such proceedings, the lessee shall pay the amount that shall be finally assessed, or imposed against said premises or be adjudicated to be due and payable on any such disputed or contested items. The legal proceedings herein referred to shall include appropriate appeals from any judgments, decrees or orders and certiorari proceedings and appeals from orders therein, but all such legal proceedings shall be begun as reasonably soon as possible after the imposition of any contested lien and shall be prosecuted to final adjudication with all promptness and despatch.

The lessee covenants and agrees that the lessee will at its own cost and expense at all times, keep the building or improvements now or hereafter erected on the land forming part of the demised premises or in the course of construction thereon, insured in the name of the lessors and lessee, as their respective interests shall appear, against

loss or damage by fire in an amount equal to the full insurable value thereof, as the same shall from time to time be determined by the Fire Insurance Exchange, Board of Fire Underwriters or any organization performing the functions usually performed by such exchange (eighty per cent clause, if procurable) in standard line fire insurance companies authorized to do business in the State of Nebraska and will deliver the policies of such insurance or certificates thereof to the lessors, and should the lessee be unable to or shall fail to secure and place such insurance for said amount, the lessors may secure and place the same, [fol. 13] in which event, the lessee shall and agrees to pay to the lessors, on demand, the amount of the premiums paid therefor.

In case the building forming part of the demised premises or any building hereafter erected upon the land forming part of the demised premises, shall be so damaged by fire or other casualty or happening during the first twenty (20) years of the term, as to substantially destroy the same, the said building shall be rebuilt as speedily as possible by and at the expense of the lessors, and the rent and taxes hereinbefore reserved shall be suspended or abated until the said building or buildings shall have been so restored and rebuilt, and put in proper condition for use and occupation, and any unearned rent and taxes paid in advance of such destruction by the lessee, shall be refunded to it, but in the event that the said building or buildings now or hereafter erected upon the land, shall be totally or substantially destroyed by fire at any time after the first twenty (20) years of the term, then the lessee shall have the option of either requiring the lessors to rebuild the same at the expense of the lessors, or of terminating this lease, in which latter event this lease shall terminate as of the date of the total or substantial destruction of the building or buildings by fire or other casualty or happening, and any unearned rent and taxes paid in advance by the lessee shall be refunded to it, and in the event of the lessee requiring the lessors to rebuild, then the lessors shall rebuild as speedily as possible, and the rent and taxes hereinbefore reserved, shall be suspended and abated, until the said building shall have been so restored and rebuilt and put in proper condition for use and occupation, but in case of such damage or destruc-

tion during the term of this lease as shall not substantially [fol. 14] destroy the building or buildings now erected or hereafter erected upon the land, then the demised premises shall be restored to their condition immediately prior to such damage or destruction with due diligence by the lessors and a just proportion of the rent hereinbefore reserved according to the extent of the injury or damage sustained by the demised premises, shall be suspended and abated until the demised premises shall have been so restored and put in safe and proper condition for use and occupation.

The lessors covenant and agree that the demised premises will be delivered to the lessee upon the commencement of the terms of this lease in as good condition as the same now are, free from all orders and notices of violation of all public and quasi-public authorities and free from complaints and/or reports of violations noted or existing in and filed with any Federal, State, County, Municipal and/or Borough authorities and subject, however, to the following leases, tenancies and occupancies:

Tenant	Space occupied	Term expiration	Annual rental	Deposit
Geo. J. Kozeros & John G. Kozeros	Basement and ground floor store, 218 S. 14th Street	Feb. 28th, 1927	$1200. to Feb. 28, 1922, $1500. from Mar. 1, 1922 to Feb. 28, 1927	None
A. P. Sanderson, Geo. Kozeros, Angelos Calozumes & John Terfis	Second floor, 218 S. 14 St., Third floor, 218 & 220 S. 14th St.	Apr. 30th, 1925	$1200.	None
Dr. Clara B. Cross	2 rooms, 2nd floor, N. W. Cor. 14th & Farnam St.	Mar. 31st, 1922	$240.	None
C. A. Sherwood	2nd floor, 220 S. 14th Street	June 30th, 1922	$300.	None
Jabez Cross	220 S. 14th Street	Apr. 14th, 1927	$1200. to Apr. 14, 1922, $1640. from Apr. 15, 1922 to Apr. 14, 1927	None
Sachs Cigar Co.	Basement and ground floor, 1406 Farnam	Feb. 28th, 1922	$3000.	None

[fol. 15]

Tenant	Space occupied	Term expiration	Annual rental	Deposit
John W. Welch	Building, 1406 Farnam St.	Apr. 30th, 1930	$4800. to Apr. 30, 1924, $7200. from May 1, 1924 to Apr. 30, 1930	None
Williams & Smith Co. & Edgar B. Williams	Storeroom and basement, N.W. Cor. Farnam & 14th Sts., and loft on 3rd floor 1406 Farnam St.	Mar. 31st, 1925	$7440.	None
J. H. Sutley	5 rooms, 3rd floor, N. W. Cor. 14th & Farnam	July 31st, 1921	$360.	None
National Security Fire Ins. Co. of Neb.	6 rooms, East side, 2nd floor, N.W. Cor. 14th St. and Farnam St.	July 31st, 1925	$420. to July 31, 1920, $600 from Aug. 1, 1920 to July 31, 1925	None
H. G. Bair	1 room, 2nd floor, N. W. Cor. 14th and Farnam Sts.	Apr. 30, 1925	$180.	None
Hayes	2 rooms, 3rd floor to left of stairway facing 14th St.	Monthly tenancy	$120.	None
Hallenborg	2 rooms, second floor to right of stairway facing Farnam St.	Monthly tenancy	$300.	None

and the said lessors do covenant, warrant, represent and agree that the said leases, which leases have been submitted to the lessee and have been initialed by it for identification, are all of the leases and agreements affecting the said premises, and that the same have not been modified, amended or extended, and the lessors covenant not to modify, amend or extend the same prior to the commencement of the term of this lease, and the said leases are hereby assigned, transferred and set over to the lessee herein as of the date of the commencement of the term hereunder and during all the rest, residue and remainder yet to come of the term mentioned in said respective leases.

The lessors covenant and agree that no rents have been paid under any of said leases beyond the commencement of [fol. 16] the terms of this lease, and no deposits have been made by any of the tenants. The lessee agrees to indemnify and hold harmless, the lessors of and from any and all claims and demands which may be made against the lessors by the said tenants for any breach by the lessors herein of the covenants to be performed by the lessors under said leases during the term of this lease.

The lessee covenants and agrees that the lessors shall not be liable for any damages to property or personal injuries caused to any person or persons during the term of this lease by reason of any defects now existing in said premises or hereafter occurring in or in front of the said premises, and it is further agreed that all personal property placed in the said premises during the term of this lease shall be so placed at the risk of the lessee only, and that the lessors or their agents shall not be liable for any damage either to person or property sustained by the lessee or other persons due to the building forming part of the demised premises or any part or appurtenances thereof, becoming out of repair or arising from bursting or leakage of water, gas, sewer, or steam pipes, or from any act of neglect of employees, co-tenants or other occupants of said building or any other person or due to the happening of any accident from whatsoever cause in and about said building.

It is expressly understood and agreed that the lessee, its successors and assigns shall have the right to demolish and/or remove any and/or all of the buildings which are now erected on the land forming part of the demised premises, or any building or buildings hereafter erected in

lieu thereof, for the purpose of erecting upon the said premises a new building or buildings, without accounting for the building or buildings so removed (all salvage to be and become the property of lessee) and the lessors covenant [fol. 17] and agree upon demand at any time after the execution of this lease, to properly execute or cause to be properly executed and deliver to the lessee all applications, consents and other instruments which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing the erection of such new building or buildings, upon the following terms and conditions:

1. The lessee shall, after demolishing such building or buildings, with reasonable diligence, cause to be erected at its own cost and expense, upon the land forming part of the demised premises, a new building or buildings of such size, dimensions and content as lessees may desire, constructed of brick, iron, concrete and/or stone, or any or all of them or other similar materials, and to be what is known generally as "fire-proof" and of modern and up-to-date construction, and to cost not less than One Hundred Thousand Dollars ($100,000.00), and that the said building or buildings, if as and when erected shall upon the expiration of the lease, become the property of the lessors; said building, if erected, shall be at least two (2) stories in height and suitable for use for stores and/or offices.

2. That lessee shall obtain all necessary and proper permits and authorizations therefor from all authorities and officers thereof having jurisdiction and the work of the construction of such new building shall be carried out in conformity with all laws, rules, regulations and ordinances affecting the same.

3. The lessee agrees to indemnify, hold harmless, and [fol. 18] protect the lessors from and against all claims, demands, fines, liens, suits, judgments, loss and damage of any kind and every nature, directly or indirectly arising from or growing out of the work of the construction of such new buildings, and the lessee further covenants and agrees that no mechanic's liens shall be caused or allowed to be filed against the demised premises and that in the event that any such mechanic's liens be filed against the said premises, the lessee shall cause the same to be discharged

by payment or by bonding or otherwise, within thirty (30) days after the filing of any such lien.

The lessee covenants and agrees that the demised premises shall not be let in whole or in part for the purpose of conducting thereon any theatre, motion picture theatre or bar room.

Attached to and Forming Part of Lease Made by Samuel A. B. Brown and Almira B. Millard to the United Cigar Stores Company of America, Dated June 14th, 1920

Rider hereto attached is hereby made a part hereof.

And the said Lessor doth covenant that the said Lessee on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the foregoing lease are binding upon the parties hereto and their respective heirs, administrators, successors, legal representatives and assigns.

[fol. 19] In Witness Whereof, the parties hereto have hereunto set their hands and affixed their respective seals the day and year first above written.

Samuel A. R. Brown, Almira B. Millard. In the Presence of: A. C. Manning, Alfred Millard. United Cigar Stores Company of America, by Wm. Baeder, Vice-President. Harry Rubenoff, J. E. Frazer.

(Acknowledged by Samuel A. R. Brown on June 29, 1920; by Almira B. Millard on June 21, 1920; and by Wm. Baeder on July 12, 1920.)

[fol. 20] In United States District Court

Notice of Motion

Sirs: Please take notice that upon the proof of debt filed herein, verified the 10th day of January, 1933, and the annexed petition of Samuel R. Brown and others, claimants herein, verified the 28th day of February, 1933, and all other

pleadings and proceedings had herein, the undersigned will move this Court at a Motion Term thereof to be held on the 13 day of March, 1933, at 11 o'clock in the forenoon of said day, before Honorable Irwin Kurtz, Referee in Bankruptcy, 15 Park Row, Borough of Manhattan, City of New York, N. Y., that the damages claimed in the proof of debt herein be liquidated and that the Court take evidence as to the amount of the claim and that upon the liquidation of said claim accordingly, the claim be allowed in accordance with the measure of loss as determined by the Court, and for such other and further relief as may be meet and just.

Dated February 28, 1933.

Rumsey & Morgan, Attorneys for Claimants. Office and P. O. address: 44 Wall Street, Borough of Manhattan, New York, N. Y.

To Cravath, DeGersdorff, Swaine & Wood, Esqs., Attorneys for Irving Trust Company, Trustee, 15 Broad Street, New York, N. Y.

[fol. 21] IN UNITED STATES DISTRICT COURT

PETITION OF SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD, AND HUGH MILLARD

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Samuel R. Brown, Almira R. Millard, Alfred Millard and Hugh Millard, respectfully represents and alleges:

1. Petitioners have heretofore and on or before the 16th day of January, 1933, filed their proof of debt herein against the above named bankrupt. Said proof of debt is hereby referred to, incorporated herein and made a part of this petition.

2. The damages claimed for the loss of rent during the residue of the term ending June 30, 1945, as more fully set forth in said proof of debt, are unliquidated. Your petitioners desire to have said claim liquidated by proof of the actual amount of loss of claimants during the residue of said term.

3. This application is made pursuant to U. S. Code, Title 11, Sec. 103 (b) (Bankruptcy Act, Sec. 63 (b).)

Wherefore, petitioners pray that an order be made herein directing that the damages on said claim be liquidated before the Referee herein, and that the Court take evidence as to said loss, and that upon such liquidation, the claim be [fol. 22] allowed in accordance with the measure of loss as determined by the Court, and for such other relief as may be meet and just.

Dated New York, N. Y., February 28, 1933.

Rumsey & Morgan, Attorneys for Petitioners. Office and P. O. address: 44 Wall Street, New York, N. Y.

(Verified by Charles Dickerman Williams on February 28, 1933.)

[fol. 23] In United States District Court

Order to Show Cause

Upon reading and filing the annexed ex parte petition of Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America, the Bankrupt herein, verified March 7, 1933, and sufficient cause appearing therefor, it is, on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for said Trustee,

Ordered that Samuel R. Brown, Almira B. Millard and Hugh Millard (hereinafter called the Claimants) show cause, if any there be, before me at a hearing to be held at 15 Park Row, in the Borough of Manhattan, City of New York, N. Y., on March 13, 1933, at 11:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be entered herein, disallowing and rejecting the claim of the Claimants set forth in the proof of claim filed herein and numbered 1796, expunging said proof of claim and ordering that no dividend be paid thereon.

Further ordered that due and timely service of this order to show cause be made by mailing a copy thereof, together with said petition of the Trustee, on or before March 9, 1933, to the Claimants at the address of the Claimants appearing on said proof of claim.

Dated New York, N. Y., March 8, 1933.

Irwin Kurtz, Referee in Bankruptcy.

[fol. 24] IN UNITED STATES DISTRICT COURT

PETITION OF IRVING TRUST COMPANY

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Irving Trust Company, as Trustee in Bankruptcy herein, respectfully shows to the Court as follows:

On September 10, 1932, your petitioner was duly appointed and qualified as Trustee in Bankruptcy of the above named Bankrupt and is acting as said Trustee.

There has been filed with this Court a proof of claim numbered 1796 by Samuel R. Brown, Almira B. Millard and Hugh Millard (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Bankrupt in the sum of $143,615.80. Your petitioner objects to the allowance of said claim for the following reasons:

This claim is based upon a lease covering premises located at the northwest corner of Farnam and 14th Streets, Omaha, Nebraska, and is for damages alleged to arise from loss of rent to accrue on and after September 1, 1932. Since such rent was not due and owing at the date of the filing of the petition in bankruptcy herein, August 29, 1932, your petitioner believes that a claim based thereon does not constitute a debt which may be proved against the bankrupt estate.

Your petitioner, accordingly, desires to have its objections to said claim heard and determined, and said claim re-considered and re-examined in accordance with the ap-
[fol. 25] plicable provisions of the Bankruptcy Act.

Wherefore, your petitioner respectfully requests that an order be entered herein

Ordering that the Claimant appear before this Court at a time and place to be fixed by this Court to show cause, if any there be, why an order should not be made and entered herein disallowing and rejecting said claim, expung-

ing the proof of claim hereinabove referred to, and ordering that no dividend be paid thereon.

Dated March 7, 1933.

Irving Trust Company, as Trustee in Bankruptcy, by Joseph T. Stearns, Assistant Secretary. Cravath, de Gersdorff, Swaine & Wood, Attorneys and Solicitors for Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

(Verified by Joseph T. Stearns on March 7, 1933.)

[fol. 26] IN UNITED STATES DISTRICT COURT

AMENDED PROOF OF DEBT

UNITED STATES OF AMERICA,
State of Nebraska,
District of Nebraska, ss:

At Omaha in the District of Nebraska, on the 13th day of March, 1933, came Winthrop B. Lane of Omaha, in the County of Douglas and State of Nebraska, attorney for Samuel R. Brown of Los Angeles, County of Los Angeles, State of California, Almira B. Millard of Los Angeles, County of Los Angeles, State of California, Alfred Millard of Los Angeles, County of Los Angeles, State of California, and Hugh Millard of the City of Madrid, Republic of Spain, and made oath and says that United Cigar Stores Company of America, a New Jersey Corporation, who is the person by whom a petition for adjudication of bankruptcy has been filed and who has been duly adjudicated a bankrupt, was at and before the filing of said petition, and still is, justly and truly indebted to the said Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, in the sum of $143,615.80. That the consideration of said debt is as follows:

On June 14, 1920, Samuel A. R. Brown and Almira B. Millard were each the owners of a 6/12 interest in the

south ¾ of Lot 8 Block 119 and the east ⅓ of Lot 7, Block 119, being 88 feet on Farnam Street and 99 feet on 14th Street, situated at the northwest corner of Farnam and 14th Streets, and being known as and by the street numbers [fol. 27] 1402-4-6-8 Farnam Street and 218 14th Street in the City of Omaha, County of Douglas, State of Nebraska, together with all buildings and improvements thereon and appurtenances thereto.

On June 14, 1920, Samuel A. R. Brown and Almira Millard, by an indenture of that date, demised said property to the above bankrupt, its successors and assigns, for the term commencing July 1, 1920, and expiring June 30, 1945, at a rent which for the period from July 1, 1924, to June 30, 1945, was to be $20,000 annually, payable in equal monthly payments in advance on the first day of each and every month during the term. Said indenture of lease also provided as follows:

"Provided also, and these presents are upon this covenant, that if the Lessee (meaning the above bankrupt) do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10 days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner [fol. 28] of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

Thereafter Samuel A. R. Brown died and Samuel R. Brown succeeded by operation of law to his 6/12 interest in said property and in said lease.

Thereafter Almira B. Millard conveyed and assigned a 1/12 interest in said property and in said lease each to Alfred Millard and Hugh Millard.

On August 29, 1932, the above bankrupt was adjudicated a bankrupt by the United States District Court for the Southern District of New York.

On September 10, 1932, Irving Trust Company, a corporation organized and existing under the laws of the State of New York, was duly elected Trustee in Bankruptcy of the above bankrupt.

On November 23, 1932, the said Trustee rejected the indenture of lease of said property.

Thereafter and on November 26, 1932, claimants, after due notice to the said Trustee and to the above bankrupt, duly entered upon the said property and the lease thereupon determined.

1. The loss of rent incurred by the tenants by reason of such termination during the residue of the term above specified is $140,615.80. Said loss is computed as follows: [fol. 29] The rent stipulated in the lease was $20,000 per annum after the payment of all taxes and charges. The property has a rental value for the residue of the term of $5,000 annually in addition to taxes and charges. The loss to claimants is therefore $15,000 annually from November 26, 1932, until June 30, 1945. The present value of said sum, discounted at 5% annually, is $140,615.80.

2. The excess of the arrears of rent at the time of said re-entry, viz., $5,000, over and above collections by the claimants from users and occupiers of said premises from September 1, 1932, to November 26, 1932, less expenses and maintenance, taxes, and other charges, viz.: $595.60 is $4,404.40.

3. The total debt is thus $145,020.20, but claim is filed for $143,615.80, so as not to exceed original proof.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that this deponent has not nor has any person by his order or to this deponent's knowledge or belief, for claimants' use, had or received any manner of security for said debt whatever, and this deponent further says that this deposition cannot

be made by the claimants in person because the claimants are located in distant cities and are unfamiliar with the facts except as informed by deponent, and that he is duly authorized by his principals to make this affidavit and that it is within his knowledge that the aforesaid debt was in-
[fol. 30] curred as and for the consideration above stated, and that such debt to the best of his knowledge and belief still remains unpaid and unsatisfied.

Winthrop B. Lane.

Subscribed and sworn to before me this 13th day of March, 1933. Paul L. Martin, Notary Public. (Notarial Seal.)

County Clerk's Certificate attached. (Seal of County Clerk.)

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CLAIMS

It is hereby stipulated and agreed by and between the undersigned that the petition of Irving Trust Company, as Trustee in Bankruptcy herein, verified March 4, 1933, to expunge the claim of Samuel R. Brown, Almira B. Millard and Hugh Millard (hereinafter referred to as the Claimants), which is set forth in the proof of claim numbered 1796 and filed herein by said Claimants through their attorney, Winthrop B. Lane, on January 13, 1933, and the petition of said Claimants, verified February 28, 1933, to liquidate said claims, shall also apply to the amended proof of claim filed with the Referee herein by said Claimants on April 5, 1933, and that the determination of the Referee, or of any other court on appeal from or review of the decision of the Referee with respect to said claim, shall apply with like force and effect to the amended proof of claim.

Dated April 7, 1933.

Cravath, de Gersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America. Winthrop B. Lane, Rumsey & Morgan, Attorneys for Samuel R. Brown, Almira B. Millard and Hugh Millard, the Claimants hereinabove referred to.

So ordered.

Irwin Kurtz, Referee in Bankruptcy.

Dated April 8, 1933.

[fol. 32] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DECISION

Two applications are presented for determination, one by the Irving Trust Company, as Trustee in Bankruptcy herein for an order to disallow and expunge the proof of claim herein, filed by Samuel R. Brown and others (hereinafter called Claimants) for the sum of $145,020.20 as their alleged loss of rentals under an agreement of lease made with the Bankrupt, dated June 14th, 1920, covering certain premises in Omaha, Nebraska; the other by the Claimants for leave to liquidate this alleged loss of rentals in the said sum, as aforesaid.

The lease herein was for the period from July 1st, 1920, to June 30th, 1945; the rent reserved after 1924 was the sum of $20,000 a year net after the payment of taxes, insurance and other incidental charges, and the said rental was to be paid in advance in equal monthly instalments. After making this lease the Bankrupt entered into possession, occupied the same, thereafter on August 29th, 1932, was adjudicated a Bankrupt, and on the same day the Irving Trust Company was appointed Receiver. After the election of the Irving Trust Company, as Trustee, on September 10th, 1932, pursuant to an order of this Court granted on September 29th, 1932, the Trustee herein, on November 23rd, 1932, duly rejected the lease.

The lease contained a covenant, as follows:

"Provided, also, that these payments are upon this covenant * * * if the Lessee shall be adjudicated [fol. 33] bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify

the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

Pursuant to this covenant, by reason of the bankruptcy of the Lessee, the Claimants as Lessors, on November 26th, 1932, duly re-entered and re-possessed themselves of the premises and terminated the lease.

The Claimants contend that the rental value of the premises until the expiration of the term, that is, June 30th, 1945, is only $5,000 a year net; that therefore, the present rental value of the premises is the difference between that amount for such period and the $20,000 a year net reserved by the lease. This results in the amount of the alleged loss, namely, $145,020.20, which also includes the loss suffered between September 1st, 1932, and November 26th, 1932, the date of the termination of said lease. The Claimants' application for leave to liquidate their [fol. 34] claim is based upon this method of computation. The Trustee, however, concedes neither the correctness of this method nor the said estimation of the rental value as being $5,000 per year for the balance of the period.

From the foregoing facts, it is clear that at the time of the adjudication herein, on August 29th, 1932, there was no termination of the lease. The bankruptcy in by itself did not bring about that result. The termination of the lease was within the control of the Claimants and they did not exercise this right until about three months after the bankruptcy, to wit: on November 26th, 1932. Undoubtedly, the Claimants recognized at the time of the adjudication herein on August 29th, 1932, the uncertainty as to the lease being carried as an asset of the estate, and accordingly whether it would be continued in force by the Trustee. Moreover, on that day, irrespective as to whether the Trustee would thereafter reject the lease and whether the Claimants would terminate the lease, it was indeed uncertain whether the Claimants would suffer any loss of rent during the residue of the term in accordance with the language of the covenant and the contract of the parties.

The Claimants stress in their brief that their proof of claim herein is not based upon an anticipatory breach of agreement to pay rent. On the contrary, they maintain that their claim is based upon the ground that the lease herein by specific agreement provided for indemnity

against loss in the event of the termination of the lease by reason of bankruptcy; that this event has taken place, to wit: termination; that therefore, the indemnity clause has been brought into play, and that accordingly the damages as a matter of law suffered by the "Landlord" (Claimants) is the difference between the rent reserved in the lease and the present rental value.

[fol. 35] In support of their position Claimants rely on the case of Maynard v. Elliott, 283 U. S. 273, as authority that the claim herein is provable in bankruptcy, and they rely upon William Filene Sons Co. v. Weed, 245 U. S. 597, as authority for establishing the propriety of their proposed method of computation of the loss of rentals, as aforesaid.

However, neither of these cases establish the propositions urged by the Claimants. In Filene Sons v. Weed, 245 U. S. 597, the covenant provided that the lessee agreed to pay to the lessor as damages (upon the termination of the lease by the lessor after default by the lessee) not the loss of rent which might be suffered during the residue of the term, but an amount equal to the difference between the then rental value and the rent and other payments named in the lease for the residue of the term.

The liability of the lessee (Bankrupt) can rest only upon the agreement contained in the lease, for no rent accrues after the lease is terminated. In the absence of an express covenant, the termination of the lease ends all liability of a tenant thereunder. Moreover, there can be no breach of a contract on the part of the lessee until the time for the payment arrives. The covenant in the instant case merely provided that the Claimants would be entitled to the loss of rent incurred by them during the residue of the term. That loss is neither presently ascertainable nor presently due and obviously will not become so due until the expiration of the term.

The Claimants, method of computation on a covenant similar to the case at bar was presented for determination in Western Electric Co., Inc. v. Powers Accounting Machine [fol. 36] (D. C., S. D. N. Y.) April 14th, 1932, unreported. This case involved an equity receivership proceeding. It appeared therein that after the Equity Receiver had dis-

affirmed the lease, the lessor re-entered and re-let the premises and filed a claim for the difference between the rent reserved in the lease and the rent received in their re-letting. The covenant of the lease provided that in the event of such re-entry by the lessor and the termination of the lease, the lessee should be liable for any loss or deficiency of rent "which might be suffered by the lessor during the remainder of the term above specified." Judge Mack in granting the application to reject the landlord's claim on the ground that it was uncertain, stated:

"But, if as in the present case, on such a termination a lessee becomes liable not for an amount then ascertainable but for the entire loss that the lessor may actually suffer during the remainder of the original term, inasmuch as it is clearly impossible to ascertain that loss until the original term shall have expired—in this case about nine years—the claim must be rejected as uncertain.

In Re Roth & Appel, supra.
Penn. Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 759.

"Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they provided that on such [fol. 37] termination, when but for the provisions no damages could be claimed, the lessee 'shall be liable for any loss or deficiency of rent which may be suffered.'

"Not only is there therefore no basis for the claim as filed for the full reserved rent, but even if it were amended so as to charge an actual termination of the lease and in respect to damages therefor to assert, contrary to the contractual provisions a right to the difference between the rents reserved and the actual rental value at the time of termination, it would have to be disallowed."

Moreover, the Filene Sons case was distinguished by Judge Knox in Schulte United case, Southern District of New York, Bankruptcy, #50355, May 21st, 1932, as follows:

"Nor does the decision in Wm. Filene's Sons Company v. Weed, 245 U. S. 597, compel a different conclusion. That

was not a bankruptcy case and no question of the provability of a claim arising from breach of a lease under the Bankruptcy Act, was there involved."

The Claimants concede that the identical question herein was presented in the leading case of Roth & Appel, 181 Fed. 667. They, however, urge that this case is no longer the law of this Circuit in that it has been overruled by subsequent decisions and particularly by the case of Maynard v. Elliott, supra.

The doctrine of this case has always been authority in this Circuit. It has not been affected by Maynard v. Elliott, which was never intended to cover the situation presented [fol. 38] upon the facts herein, namely, a claim contingent both as to existence and amount and incapable of ascertaining the loss suffered by the Claimants for the residue of the term (June 30th, 1945).

In Roth & Appel, 181 Fed. 667, the Court stated:

"* * * The question in this case—at least with respect to a large part of the claim—is not, in its essence, whether rent to accrue in the future is provable against a bankrupt estate, but whether a claim founded upon an agreement to indemnify a landlord for loss of rents following bankruptcy is provable. * * *"

"* * * But the covenant of indemnity in the present lease was of a very different nature. It called for the payment of no fixed and certain sum. Its purpose was merely to guarantee against possible loss.

"The inquiry, then, is as to the status of the lessor's demand upon this indemnity covenant at the time when the petition in bankruptcy was filed; for it is held that this is the time when the provability of claims against the estate of a bankruptcy is fixed. * * *

"Now, when the petition was filed, the first step toward declaring the lessee bankrupt was taken. It was not certain that bankruptcy would follow; but, if it did follow, the lessor would have the right to re-enter and terminate the lease. Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt, and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry, and not by the bankruptcy. In re Ells (D. C. 98 Fed. 967). But the lessor was not obligated to re-enter and whether he would do so or not was manifestly dependent upon uncertainties. In-

[fol. 39] deed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature.

"(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

"(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant.

* * * * * * *

"For these reasons, we think that the claim of the appellant, whether regarded as one for unaccrued rents or for indemnity for loss of rent, was not provable against the bankrupt estate under either section 63a (1) or 63a (4), and was properly expunged by the district Court."

The doctrine of Roth & Appel has just been reaffirmed in this District and in this Circuit, in the matter of In re Wise Shoe Inc., 22 A. B. R., 125 (affirmed Second Circuit, April 4th, 1933), viz:

In that case the claim filed by the landlord was based upon a covenant that in the event of default under the lease by the tenant, that the landlord had the right to terminate the lease, re-enter and re-let the premises for the tenant's account and hold the tenant for the difference between the fixed rent for the residue of the original term and the rental realized for re-letting to other parties. Pursuant to this provision the landlord had re-entered the premises prior to the bankruptcy of the tenant.

[fol. 40] Judge Patterson of the District Court in determining that the Landlord's claim was not provable, stated at page 126:

"The provability in bankruptcy of landlords' claims growing out of leases of real estate depends upon the status at the time of bankruptcy. The general rule is that a claim for future rent is not provable. The obligation on the rent covenant is 'altogether contingent.' In re Roth & Appel (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed, 667; Watson v. Merrill (C. C. A., 8th Cir.) 14 Am. B. R. 453, 136 F. 359.

Where the lease imposes upon the tenant the duty of making good to the landlord, any loss in rents due to the tenant's default and subsequent reletting by the landlord, a claim for such loss is not provable in cases where the lease was still a subsisting one at the time of the tenant's bankruptcy. In re Roth & Appel, supra; in re Ells (D. C., Mass.) 3 Am. B. R. 564, 98 F. 967; McDonnell v. Woods (C. C. A., 1st Cir.) 4 Am. B. R. (N. S.) 513, 298 F. 434. Such a claim is said to be too uncertain at the time of bankruptcy in two respects, first as to whether the landlord will re-enter and thus terminate the lease, and second, as to whether any loss in rents will actually come about. The second uncertainty or contingency is found also in cases like the present one, where the landlord had declared the lease terminated prior to bankruptcy but had not then relet the premises. It cannot be predicted at the time of bankruptcy whether there will be any loss. Hence it is held that in such a case a claim based upon the tenant's agreement to indemnify is not provable. (In re Service Appliance [fol. 41] Co., (D. C., N. Y.) 15 Am. B. R. (N. S.) 478, 39 F. (2d) 632; In re Goldberg (D. C., N. Y.), 18 Am. B. R. (N. S.) 332, 52 F. (2d) 156; In re Hubbard (D. C., N. Y.), 20 Am. B. R. (N. S.) 612, 57 F. (2d) 213."

In view of all the foregoing, the Trustee's application is granted, and the proof of claim herein is disallowed and expunged. The Claimants' application for leave to liquidate is accordingly denied.

Submit order on two days' notice.

Dated New York, April 24th, 1933.

Irwin Kurtz, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

ORDER EXPUNGING CLAIM

Upon reading and filing the amended proof of claim filed April 7, 1933, the petition of Irving Trust Company, Trustee in Bankruptcy, herein, verified the 7th day of March, 1933, the order to show cause filed herein the 13th day of March, 1933, the affidavit of John T. Nolan, verified March 8, 1933, as to the mailing of said petition and order to show cause to Samuel R. Brown, Almira B. Millard and Hugh Millard, the Claimants referred to in said petition, from

which it appears that said petition and order were duly [fol. 42] served by mail as therein provided, the petition of said Claimants, verified the 28th day of February, 1933, and the notice of motion, dated February 28, 1933, and the matter having duly come on to be heard before this Court on the 13th day of March, 1933, in pursuance of the provisions of said order to show cause and said notice of motion, and after hearing Messrs. Rumsey & Morgan, the attorneys for said Claimants, by C. D. Williams, Esq., of counsel, in opposition to the petition of said Trustee and in support of the petition of said Trustee and in support of the petition of said Claimants, and Messrs. Cravath, de Gersdorff, Swaine & Wood, the attorneys for said Trustee, in support of the petition of said Trustee and in opposition to the petition of said Claimants, and upon due consideration,

It is, on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys for said Trustee,

Ordered that the petition of said Trustee, verified March 7, 1933, be and it hereby is, in all respects granted, that the claim set forth in the proof of claim numbered 1796 filed herein on January 13, 1933, by Samuel R. Brown, Almira B. Millard and Hugh Millard, the Claimants above referred to, be, and it hereby is, disallowed and rejected, that said proof of claim be, and it hereby is, expunged and that no dividend be paid thereon, and it is

Further ordered that the relief prayed for in the petition of said Claimants be, and it hereby is, in all respects denied and said petition dismissed.

Dated New York, N. Y., April 26, 1933.

Irwin Kurtz, Referee in Bankruptcy.

[fol. 43] IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW

To the Honorable Irwin Kurtz, Esq., Referee in Bankruptcy:

The petition of Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard respectfully represents and alleges.

I. Petitioners are creditors of United Cigar Stores Company of America, the above named bankrupt, and their claim in the sum of $143,615.80 was heretofore filed herein. The damages claimed therein being unliquidated, petitioners thereafter filed their petition herein to liquidate the same. Thereafter objections were filed by the Trustee and the same were duly heard by the referee herein. The referee held petitioners' claim unprovable.

II. On the 26th day of April, 1933, an order, a copy of which is hereto annexed, was made and entered herein by which petitioners' petition was denied and their claim disallowed, rejected and expunged, and it was ordered that no dividend be paid thereon.

III. Such order was and is erroneous in that the referee erred in holding that the claim alleged in such proof does not constitute a debt which may be proved against the bankrupt estate.

Wherefore, your petitioners, feeling aggrieved because of such order, pray that the same may be reviewed as pro-
[fol. 44] vided in the Bankruptcy Act and in General Order XXVII.

Dated New York, N. Y., April 26, 1933.

Rumsey & Morgan, Attorneys for Petitioners. Office and P. O. Address: 44 Wall Street, Borough of Manhattan, City of New York.

(Verified by Charles Dickerman Williams on March 26, 1933.)

[Here follows order of referee printed supra at folios 123-126.]

[fol. 45] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF REFEREE

To the Honorable Judges of the United States District Court, Southern District of New York:

I, Irwin Kurtz, Referee in Bankruptcy herein, do hereby certify:

1. On April 26th, 1933, an order was made which granted the application of the Irving Trust Company as Trustee, to disallow and expunge the proof of claim of the Petition-

ers' herein, and at the same time denied the Petitioners' application for leave to liquidate the same. This order was based upon the ground that the said claim was not provable in bankruptcy as it was for unliquidated damages upon an indemnity for loss of future rentals, by reason of the termination of the lease herein by the petitioners—(Land lords) which occurred after the adjudication herein.

2. On April 29th, 1933, the Petitioners feeling aggrieved thereat filed a petition for review.

3. The error complained of is that the proof of claim herein constitutes a debt provable in bankruptcy.

4. A summary of the proceedings herein, the contentions of both the Petitioners and the Trustee, and the conclusions of the Referee are fully set forth in the Decision dated April 24th, 1933, to which the Court is respectfully referred as to the legal question presented.

[fol. 46] 5. I hand up herewith the following:

(a) Petition for Review.

(b) Referee's decision dated April 24th, 1933.

(c) Order sought to be reviewed.

(d) Application of Trustee and Petitioners, and original and amended proof of claim.

Dated New York, May 1st, 1933.

Irwin Kurtz, Referee in Bankruptcy.

This Certificate will be on the Bankruptcy Motion Calendar for hearing in the District Court, on Wednesday, May 3rd, 1933, at 10.30 A. M.

Notice thereof by mail has been given to Rumsey & Morgan, Esqs., Attorneys for Petitioners, 44 Wall Street, New York City; Messrs. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee, 15 Broad Street, New York City.

[fol. 47] IN UNITED STATES DISTRICT COURT,
SOUTHERN NEW YORK

Present: Hon. Frank J. Coleman, District Judge.

In Bankruptcy. No. 55129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

Re Claim of Samuel R. Brown et al.

ORDER APPEALED FROM—May 3, 1933

Petitioners Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, having heretofore, on April 29, 1933, filed their petition for review of the order of Hon. Irwin Kurtz, Referee in Bankruptcy, of April 26, 1933, granting the application of the Irving Trust Company, as Trustee, to disallow and expunge the proof of claim of the petitioners herein, and denying the petitioners' application for leave to liquidate the same, and said petition for review having come on for hearing before the Court, and the Court being duly advised in the premises,

It is ordered, adjudged and decreed by the Court that the Referee's said order be and is hereby affirmed and that the petition for review be and is hereby denied and dismissed.

To all of which petitioners except.

Frank J. Coleman, U. S. D. J.

[fol. 48] MEMORANDUM ENDORSED ON ORDER APPEALED FROM

This order is signed without argument because the question involved has already been passed upon by five other Judges of this Court and I, therefore, deem is not open so far as the District Court is concerned.

5/3/33.

Frank J. Coleman, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Now come the above named petitioners, Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, and feeling themselves aggrieved by the final order, judgment and decree of this Court entered on May 3, 1933, [fol. 49] in the above entitled proceeding, affirming the order of the Referee made and entered herein on April 26, 1933, which order of the Referee denied the petitioners' petition to liquidate their claim herein and disallowed, rejected and expunged the same and ordered that no dividend be paid thereon, and denying and dismissing said petitioners' petition for review of said order of the Referee, hereby petition for an appeal from the said order, judgment and decree to the United States Circuit Court of Appeals for the Second Circuit, and pray that their appeal may be allowed and a citation granted, directed to Irving Trust Company, Trustee of the above entitled bankrupt estate, commanding said Trustee to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceeding and paper upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., May 4, 1933.

Rumsey & Morgan, Attorneys for Petitioners-Appellants. Office and Post Office address: 44 Wall Street, Borough of Manhattan, City of New York.

[fol. 50] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Petition approved and appeal allowed as prayed for; bond on appeal dispensed with on stipulation of counsel.

May 5, 1933.

Frank J. Coleman, U. S. D. J.

In United States District Court

Assignment of Errors

Now come the above named petitioners Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard and file the following assignment of errors and say that the final order, judgment and decree of the United States District Court for the Southern District of New York, entered herein on May 3, 1933, is erroneous for the following reasons:

1. The Court erred in affirming the order of the Referee made and entered April 26, 1933, which order of the Referee denied petitioners' petition to liquidate their claim herein and disallowed, rejected and expunged the same and ordered that no dividend be paid thereon.
2. The Court erred in denying and dismissing petitioners' petition for review of the said order of the Referee.
3. The Court erred in disallowing, rejecting and expunging petitioners' claim herein and in ordering that no dividend be paid thereon.

[fol. 51] 4. The Court erred in denying petitioners' petition to liquidate their claim.

5. The Court erred in holding that the claim alleged in petitioners' proof does not constitute a debt which may be proved against the bankrupt estate.

Wherefore, petitioners pray that said order, judgment and decree may be reversed and that their claim be allowed as prayed for.

Dated New York, N. Y., May 4, 1933.

Rumsey & Morgan, Attorneys for Petitioners-Appellants. Office & Post Office address: 44 Wall Street, Borough of Manhattan, City of New York.

[fol. 52] Stipulation Waiving Bond

Stipulation of counsel waiving bond on appeal omitted in printing.

Citation

Citation in usual form; omitted in printing.

In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record in said District Court, in the above entitled matter as agreed on by the above named petitioners-appellants and Irving Trust Company, Trustee in Bankruptcy.

Dated May 8th, 1933.

Rumsey & Morgan, Attorneys for Petitioners-Appellants. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee in Bankruptcy.

[fol. 53] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 466

Argued June 9, 1933. Decided July 17, 1933

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD, and HUGH MILLARD, Appellants,

v.

IRVING TRUST COMPANY, Trustee, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal from an order in bankruptcy of the District Court for the Southern District of New York expunging a claim against a trustee.

Charles Dickerman Williams, of New York City, for appellants.

Donald C. Swatland, Wm. D. Whitney, and R. L. Gilpatric, all of New York City, for appellee.

A. M. Hollister, amicus curiæ.

L. HAND, Circuit Judge:

This case is governed by the case of Manhattan Properties, Inc., v. Irving Trust Co., Trustee, — F. (2d) —, handed down herewith, if the covenant in the lease is in substance the same. For this reason we confine ourselves to its consideration. The lease gave the lessor a right of re-entry upon breach of any of the covenants contained, or in case the term was seized on execution, or that the lessee was adjudicated, or had assigned for the benefit of creditors. The lessee's covenant in case of re-entry for any reason was that "it will indemnify the lessor against all loss of rent which the lessor may incur by reason of such termination, during the residue of the term." We cannot construe this language as meaning that the lessee will pay the difference

between the aggregate of the accelerated rents, discounted, and the present value of the term, assuming that that would make the claim provable, which we do not say. The lessor might well not have been content with any such relief; rents might fall after the reentry and leave him uncovered pro tanto. True, he might have reserved such an option, if there was also a provision for liquidated damages, besides the language we have quoted. But he cannot make the clause serve both purposes; one, give him an immediate claim for liquidated damages; the other, a series of claims for the difference between each installment and what he could get on a release, or perhaps only a general claim for indemnity at the end of the term. The New York Court of Appeals suspended for so long a clause, even like that in Manhattan Properties, Inc., v. Irving Trust Co.; Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015. There is more reason to do so here. But it is not necessary for us to decide whether the clause was so suspended, or whether the lessee should pay the difference each month; in either case there can be no proof.

The claimant next argues that in case of bankruptcy it could not have been the purpose to reserve a claim or a series of claims in the future against a bankrupt corporation, and that for this reason the promise should be construed as one for liquidated damages. If the only condition of re-entry had been bankruptcy, more could be said for this, though hardly enough in view of the terms chosen; but under this lease the lessor might re-enter for any breach of covenant, and some of these might occur while the lessee was amply able to respond. If in those events the promise was to indemnify the lessee seriatim, or at the end of the term, we cannot recast the words to make them over into a liquidation of damages in the case of bankruptcy. Possibly the full intent was not expressed; if so, the loss must fall upon the lessor, who presumably drafted it.

Finally, the question arises as to so much of the claim as accrued before the expiration of the time to file claims, which could of course have been pro tanto liquidated in season, like a claim against an indorser of a note which became due before that time. This part of the claim seems to me to present acutely the issue in general, and of course as I should include damages for all installments, a fortiori I should include these. But taken strictly, the doctrine of

In re Roth & Appel (C. C. A.) 181 F. 667, 31 L. R. A. (N. S.) 270, does not admit of that variant. A claim for future rent must be fixed at petition filed and not become absolute thereafter; the distinction attaches not only to realty itself, but to covenants which concern it or rents issuing from it. We all agree that the claim was either good or bad as a whole, though we recognize that there are stronger reasons for holding good that part which fell due before the expiry of the period to file claims, or to distribute the estate.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of UNITED CIGAR STORES COMPANY, Bankrupt;
SAMUEL R. BROWN et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree. Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of In the Matter of United Cigar Stores Company, Bankrupt; Samuel R. Brown et al., Appellants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of September, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,109. U. S. Circuit Court of Appeals, Second Circuit. Term No. 506. Samuel R. Brown, Almira B. Millard, Alfred Millard, and Hugh Millard, petitioners, vs. Irving Trust Company, as trustee in bankruptcy of United Cigar Stores Company. Petition for a writ of certiorari and exhibit thereto. Filed October 5, 1933. No. 506, O. T., 1933.

(4256)

No. 505

FILED
OCT 5 1933
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

MORRIS J. BRICKER,
C. DICKERMAN WILLIAMS,
Counsel for Petitioner.

New York, October, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully submits its petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of Matter Involved.

In 1927 petitioner's predecessor leased premises at 907 Madison Avenue, New York City, New York, to the bankrupt, Oliver A. Olson Co., for a term ending October 1, 1937 (R. 2). The lease contained a covenant authorizing termination upon tenant's default, and providing that if termination took place under such circumstances, the tenant would "pay each month to the Landlord the deficit accruing from

the difference between the amount to be paid as rent as herein reserved and the amount which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord" (R. 19).

The bankrupt was adjudicated in the United States District Court for the Southern District of New York (R. 3).

Petitioner's claim, to the extent of $25,000, is the difference between rent reserved and rental value for the residue of the term (R. 3).

The $25,000 item was disallowed by Referee Olney (R. 25), whose order was affirmed by the District Court (Coxe, J.—R. 33) and by the Circuit Court of Appeals (opinion by L. Hand, J.—R. 48).

The Court below, although deciding adversely to petitioner, was not unsympathetic to its claim.

Although Judge Learned Hand did not in terms dissent, he expressed the conclusions of the individual judges as follows in the opinion (R. 47):

> "For these reasons my brothers believe that it [the doctrine of its own previous decision in *In re Roth & Appel,* 181 Fed. 667, that such claims were unprovable] has become the settled law of this Circuit and that we should adhere to it. For myself, while I recognize the force of this application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer but the fluctuations are less rapid. Some chances must be taken, but that is often so."

Judge Hand's reference to the "authoritative declaration" of the provability of "contingent claims" is shown by the

rest of his opinion to be an allusion to the decision of this Court in *Maynard* v. *Elliott,* 283 U. S. 273, that liability need not have accrued at the time of the filing of the petition.

Judge Hand's reference to the "authoritative declaration" of the provability of "contingent claims" is shown by the rest of his opinion to be an allusion to the decision of this Court in *Maynard* v. *Elliott,* 283 U. S. 273, that liability need not have accrued at the time of the filing of the petition.

Question Presented.

Is a landlord's claim for damages suffered by reason of a bankrupt tenant's default upon a lease which contains an indemnity clause, provable in bankruptcy?

Reasons Relied on for Allowance of the Writ.

1. The present economic depression has made this question one of acute importance which should be passed on by this Court.

Because of the depression there have been very many bankruptcies like that in this case, in which landlords have lost the benefit of advantageous contracts.

Moreover, the use of the Bankruptcy Act by chain store organizations,* illustrated by the accompanying *Brown* case, arising in the United Cigar Stores bankruptcy, to throw a disproportionate part of the economic loss suffered by their creditors upon the landlord group, has resulted in wholesale defaults on leases throughout the country. The issue of certiorari to review a decision of the Second Circuit is especially appropriate, because the chain store cases involv-

* *In re McCrory Stores Corporation, In re United Cigar Stores Company, In re F. & W. Grand 5-10-25 Cent Stores, Inc.,* and *In re Louis K. Liggett Drug Company* are the best known of the chain store bankruptcy proceedings now pending in the Southern Judicial District of New York.

ing leases everywhere in the nation are under administration in that Circuit. This is especially hard upon those landlords in circuits which hold their damage claims provable.

Indicative of the general interest are the numerous articles on this subject which have recently appeared in legal periodicals.†

2. There is perhaps no question of law upon which there has been greater diversity of view among the lower federal courts than that of the provability of landlords' claims in bankruptcy.

The opinion of Judge Learned Hand (*Manhattan Properties* case) expressly notes that the Circuit Courts of Appeals of the Third Circuit (*In re Keith-Gara Co.*, 203 Fed. 585) and of the Seventh Circuit (*In re Chakos*, 24 Fed. [2d] 482) have held landlords' claims for damages provable. Judge Hand concludes that in the First, Fifth, Eighth and Ninth Circuits the rule is otherwise. He also mentions the Sixth, but it is believed that the actual decisions in the Sixth Circuit are not hostile to claims on leases containing indemnity covenants. A detailed analysis of the law in the various circuits is annexed to brief filed herewith as an appendix.

This diversity of view has several times been the subject of remark by judges of the lower courts. As long ago as 1911, Judge Hough, sitting in the District Court for the Southern District of New York, said in *In re Roth & Appel*, 174 Fed. 64, at p. 68:

> "The hopeless confusion produced by conflicting decisions on the subject under review requires an authoritative ruling, which this court cannot give. The matter should be promptly taken to the Circuit Court of Appeals, and settled, at least so far as this circuit is concerned."

† *Rent Claims in Bankruptcy*, Schwabacher and Weinstein, 33 COL. L. REV. 213; *Landlords' Claims in Reorganizations*, Douglas and Frank, 42 YALE L. J. 1003; *Landlords' Claim for Damages for Breach of Lease*, Aidlin, 20 CALIF. L. REV. 622; *Effect on Lease of Bankruptcy of Tenant*, Lewis, 65 U. S. L. REV. 611; also CIN. L. REV. 162; 15 MINN. L. REV. 584; 25 ILL. L. REV. 323; 16 VA. L. REV. 610.

This sentiment was echoed the following year by Judge McPherson of the Eastern District of Pennsylvania in *In re Caloris Mfg. Co.*, 179 Fed. 722, at p. 723:

> "I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion' and that *an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey.*"

Judge McPherson's decision was diametrically opposed to that of Judge Hough.

And as recently as 1932, Judge Knight, sitting in the Western District of New York, said in *In re Hubbard*, 57 Fed. (2d) 213:

> "As was said by Judge Hough in *In re Roth & Appel*, 174 F. 64, 68, there is 'hopeless confusion' in the decisions upon the question of whether claims arising out of leases entered into before and continuing by their terms after adjudication are provable in bankruptcy."

The reason these judges used the expression "hopeless confusion" is perhaps that, although there may be only two rules, there has been an extraordinary variety of reasoning. Even the courts that agree as to result do not agree as to why that result should be reached.

3. The rationale of most of the decisions hostile to landlords' claims has been eliminated by subsequent decisions of this Court.

Because the trustee has the right of affirming leases, some courts have said that the liability of the bankrupt tenant does not accrue until after the filing of the petition. That the trustee's right of affirmation of a forward commercial contract prevents the injured party from proving a claim

for the loss of the value of the contract, after disaffirmance, is denied by *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581; and in *Maynard* v. *Elliott,* 283 U. S. 273, this Court held that it was not necessary that the liability have accrued at the time of the filing of the petition.

The leading cases in the circuits holding against provability antedate these decisions of this Court, and, indeed, the majority of the Circuit Court of Appeals in this case felt prevented by the doctrine of *stare decisis* from re-examining its own earlier decisions.

4. It seems manifestly unfair that all other persons damaged by the bankrupt's default on forward contracts should be allowed to prove damages, but that landlords should be excluded. Damages have been held provable with respect to at least the following forward agreements anticipatorily breached by bankruptcy:

An agreement to pay in instalments over a term of years for a baggage and livery privilege (*Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U. S. 581);

A life annuity (*Cobb* v. *Overman,* 109 Fed. 65 [C. C. A. 4th]);

Endorsement of commercial paper (*Maynard* v. *Elliott,* 283 U. S. 273);

A contract of suretyship (*Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549);

An instalment contract to buy ice (*In re Stern,* 116 Fed. 604 [C. C. A. 2d]);

Employment contracts (*Ex parte Pollard,* Fed. Cas. No. 11,252 [D. Mass.]; *In re Schultz & Guthrie,* 235 Fed. 907 [D. Mass.]);

A lease of personal property (*In re Desnoyers Shoe Co.,* 227 Fed. 401 [C. C. A. 7th]);

A contract to buy cotton bagging (*Lesser* v. *Gray,* 236 U. S. 70;

An instalment contract to sell rubber (*In re Portage Rubber Co.*, 296 Fed. 289 [C. C. A. 6th];
A contract to buy stock (*In re Pettingill*, 137 Fed. 143 [D. Mass.]).

5. The most recent expressions by this Court favor provability of landlords' damage claims.

In *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, this Court held a landlord's claim for damages for loss of rent unprovable upon the sole ground that the amount stipulated as damages in the lease bore so little relation to actual loss as to be penal. The Court said in part (p. 226):

> "The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

This language suggests that actual damages would be thought provable.

In *Maynard* v. *Elliott*, 283 U. S. 273, this Court stated that the doctrine of *In re Roth & Appel*, 181 Fed. 667, that the limitation of subdivision (1) of Section 63-a of the Act should be read into subdivision (4) had been "rejected." *In re Roth & Appel* has always been regarded as the leading case against landlord's claims and is the case here followed by the Court below. The opinion in *Maynard* v. *Elliott* cited with approval the cases of *In re Caloris Mfg. Co.*, 179 Fed. 722 (E. D. Penna.); *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.), and *In re Keith-Gara Co.*, 203 Fed. 585 (E. D. Penna.), all of which cases expressly refused to follow *In re Roth & Appel*. The same opinion cited with approval *Moch* v. *Market Street National Bank*, 107 Fed. 897 (C. C. A. 3d), referred to in the *Caloris* case as inconsistent with *In re Roth & Appel*. In both the *Caloris* and *Keith-Gara* cases landlords' damage claims were held provable.

6. The *Manhattan Properties* and *Brown* cases present two popular and usual forms of indemnity covenants. The one is a month-to-month clause, the other a simple loss clause. By exercising jurisdiction in these cases the Court will presumably be able to dispose of the whole subject.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the decree of the Circuit Court of Appeals of the Second Circuit in the above case, and that said decree be reversed.

MORRIS J. BRICKER,
C. DICKERMAN WILLIAMS,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 43-48) has not yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals, sought to be reviewed, was entered on July 24, 1933 (R. 48).

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Facts.

The facts have been stated in the petition.

Specification of Errors.

It is submitted that the Court below erred:

1. In affirming the decree of the District Court.

2. In holding that the damage item in the proof of claim did not set forth a provable debt and should be disallowed.

3. In adhering to the rule of *In re Roth & Appel,* 181 Fed. 667, despite the decision in *Maynard* v. *Elliott,* 283 U. S. 273.

Summary of Argument.

The claim here at issue comes precisely within Section 63-a (4) of the Act, and should be liquidated under Section 63-b.

The fact that the contingency which brought the indemnity clause into play occurred after the filing of the petition is not important (*Maynard* v. *Elliott,* 283 U. S. 273), if, indeed, the filing of the petition itself did not terminate the lease (*Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581).

The tenant was still liable after the termination of the lease and re-entry, by virtue of the indemnity clause (*Chicago Auditorium* case; *Gardiner* v. *Butler & Co.,* 245 U. S. 603).

The damages are not too speculative. They are, as in anticipatory breach of contract cases, the value of the contract, which is measured by the difference between what was payable under it and is obtainable under the best similar forward contract that can then be made (cf. *Roehm* v. *Horst,* 178 U. S. 1), a sum which has been crystallized through constant application in many anticipatory breach of lease cases into the formula, difference between rent reserved and rental value for the remainder of the term (*Wm. Filene Sons Co.* v. *Weed,* 245 U. S. 597).

This is the method of calculating, in bankruptcy and otherwise, damages resulting from anticipatory breach of forward contracts such as those relating to employment, annuities, commodity purchases, indemnities (citing cases), and should be followed here.

POINT I.

The claim comes precisely within Section 63-a (4) of the Act and should be liquidated under Section 63-b.

Section 63 of the Act provides as follows:

> "(a) Debts of the bankruptcy may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied;
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against the estate."

This section was construed by this Court in *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 556, as follows:

> "Within the intendment of the law provable debts include *all liabilities* of the bankrupt *founded on contract,* express or implied, which at the time of the bankruptcy were fixed in amount *or susceptible of liquidation.*"

POINT II.

The fact that re-entry took place after the filing of the petition is irrelevant. No reason appears for not applying the usual rule that bankruptcy was an anticipatory breach of the contract, including the indemnity clause, but, in any event, it is not necessary that debts under Section 63-a (4) be "absolutely owing at the time of the filing of the petition." *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581; *Maynard* v. *Elliott*, 283 U. S. 273; cf. *In re Desnoyers, Shoe Co.*, 227 Fed. 401 (C. C. A. 7th).

In the *Chicago Auditorium* case this Court held that the filing of a petition in bankruptcy constituted the anticipatory breach of a long term contract to pay in instalments for a livery privilege.

The doctrine of anticipatory breach of contract has sometimes been held inapplicable to leases on the ground that the trustee had the privilege of adopting the lease, and that the lease could therefore not be terminated until the trustee disaffirmed the lease.

But obviously this fact cannot distinguish the lease situation from the *Chicago Auditorium* case. The trustee had the same privilege of affirmance with respect to the executory livery privilege agreement there involved and also had that privilege in the numerous executory commercial contracts with respect to which proof of damages has been allowed (discussed *infra*, pp. 21-23).

The *Chicago Auditorium* case has been distinguished on the ground that it applies to personal covenants only. This might be a valid basis of distinction with respect to leases not containing a damage covenant, but such covenants are personal and survive termination of the lease (*Wm. Filene Sons Co.* v. *Weed*, 245 U. S. 597; *Gardiner* v. *Butler & Co.*, 245 U. S. 603). This point is more fully discussed *infra* (pp. 13-15).

But the question as to whether or not the doctrine of the *Chicago Auditorium* case applies in lease cases is no longer important.

The requirement that the liability exist at the time of the filing of the petition against the bankrupt in order that a claim based upon express contract be provable was removed by the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, in which the case of *In re Roth & Appel* and its reasoning were specifically condemned. The Court there held that the limitation of subdivision (1) that claims evidenced by judgments and instruments in writing be "absolutely owing at the time of the filing of the petition" *should not be read into subdivision (4)*. In the *Maynard* case the bankrupt was liable as an endorser on a note that was by its terms not due *until over a year after the adjudication in bankruptcy.* This Court (opinion by Stone, J.) held that the Bankruptcy Act should be construed "to relieve the honest debtor from the weight of oppressive indebtedness," and that giving due weight to such purpose the claim could not be held unprov-

able (pp. 277-278). *The Court expressly referred to the case of In re Roth & Appel* (at p. 277) *and stated that the contention that the limitation of subdivision* (*a*) (*1*) *should be read into subdivision* (*a*) (*4*) *had been "rejected."*

Application of this ruling is especially appropriate in the present case, involving as it does a liability that was in fact fixed as an immediate and direct result of the bankruptcy, a result contemplated by the lease. In *Maynard* v. *Elliott* liability was fixed by the default of the maker, an event entirely independent of the bankruptcy, and not in fact even substantially coincident therewith, but occurring after the period for the filing of claims had expired.

The courts have often indicated an intention to regard liabilities precipitated by the bankruptcy itself as provable. "But we agree with what was said in *Ex parte Pollard,* 2 Low. 411, Fed. Cas. No. 11,252, that it would be an 'unnecessary and false nicety' to hold that because it was the act of filing that wrought the breach, therefore there was no breach at the time of the filing of the petition" (*Chicago Auditorium* case, 240 U. S. 592).

And where bankruptcy authorized the termination of a contract, the termination has been held to relate back to the filing of the petition (*In re Desnoyers Show Co.,* 227 Fed. 401 [C. C. A. 7th]).

POINT III.

The covenant of indemnity was a personal covenant, not a rent covenant, and is therefore not objectionable under the *Chicago Auditorium* case, but is provable within its doctrine.

Petitioners rest their claim not upon a covenant to *pay rent,* but upon a covenant of indemnity, a personal covenant. Such a covenant is for damages and not for rent.

> *Filene* case, 245 U. S. 597, 602 ("It is not for rent at all");
> *Hermitage Co.* v. *Lævine,* 248 N. Y. 333.

Consequently, it is not objectionable under the *Chicago Auditorium* case as a rent covenant, but is a personal covenant, and may be made the subject of a claim in bankruptcy.

In the *Chicago Auditorium* case this Court said, mentioning certain cases holding claims relating to real estate not provable in bankruptcy (240 U. S. 590):

> "Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the meere personalty.' Co. Litt. 292, b, Sec. 513."

This remark is sometimes claimed to mean that there is some arbitrary, unexplained and inexplicable feature of contracts relating to real estate that withdraws them from the operation of Sections 63-a (4) and 63-b. Reference to subsequent decisions of the Court and to the quoted section of Co. Litt. answers this argument.

As explained in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the Court's remark was simply directed to the point that at common law the doctrine of anticipatory breach of contract was not applied in the ordinary lease case—*"in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee"* (245 U. S. 605).

But that the Court did not mean to indicate that a specific promise by the lessee to indemnify actual loss suffered by the lessor was not enforceable to recover the present value of his loss computed according to conventional method is shown by the fact that in the *Gardiner* case itself an equity receivership proceeding, which related to two Massachusetts leases, *such damages were allowed as to the lease containing an indemnity covenant, and not allowed as to the lease not containing such covenant.*

And in the *Filene* case the Court expressly held that an agreement to pay compensatory damages upon termination of a lease due to the tenant's default was a "personal covenant."

The holding in the *Filene* case, that an agreement by the tenant to pay compensatory damages upon termination of the lease was a personal covenant, is in accord with the general rule that agreements in leases other than for rent in the true sense "touch" "meere personalty" as opposed to "realty."

Witton v. *Bye,* Cro. Jac. 486 (K. B.);
Baynton v. *Bobbett,* 2 Vent. 67 (C. B.);
Newton v. *Weeks,* Aleyn 79 (K. B.);
Clarke v. *Peppin,* 2 Vent. 97 (C. B.);
Anonymous Case, Noy. 60 (Q. B.);
Anonymous Case, 12 Mod. 73 (K. B.);
Lambert v. *Norris,* 2 M. & W. 333 (Exch.).

We refrain at this time from extended discussion of Co. Litt. 292, b, Sec. 213. That section does not hold by any means that no covenant in a lease can survive non-enjoyment.

POINT IV.

The Trustee's argument that the loss is too speculative for assessment overlooks familiar methods of ascertaining damages in cases of anticipatory breach of contract and in liquidating claims in bankruptcy. It is not and cannot be required that the loss be actually experienced, but the value of the contract is determined.

The Trustee, in arguing that the loss is incapable of valuation, does not contend that the value of the lease for the remainder of the term cannot be definitely ascertained—indeed in its brief below it characterized "difference between rental value and rent reserved" as a "definitely measurable sum."

Rather, it asserts that it is impossible at the present time to ascertain what the actual loss will be in 1945, when the term expires.

This argument, petitioners submit, overlooks the whole doctrine of assessing damages for anticipatory breach of contract, and that of liquidating claims in bankruptcy.

The mere fact that suits for anticipatory breach of contract and liquidation in bankruptcy of obligations due *in futuro* are permitted shows it is not regarded as essential to the establishment of damage in either instance that the loss actually have been experienced.

It is in liquidating claims in bankruptcy and in ascertaining damages for anticipatory breach of contract that the courts principally have occasion to determine the present value of future obligations. On the subject of ascertaining present values, bankruptcy and anticipatory breach of contract cases are cited interchangeably, as, for instance, in *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 250 Fed. 327, at p. 339 (C. C. A. 2d). The decision of this Court in *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, that bankruptcy was an anticipatory breach of contract further assimilated the two situations in so far as the calculation of damages is concerned.

It is axiomatic in both cases that it is unnecessary that the loss actually be experienced.

That the injured person need not wait until the expiration of the time for the execution of an advantageous executory contract was the decision of the English courts in the famous case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678.

In *Roehm* v. *Horst*, 178 U. S. 1, this Court approved and followed the case of *Hochster* v. *De la Tour*. Its opinion expressly recognized that plaintiff's loss had not been actually experienced at the time of the trial. The case concerned the repudiation by the buyer of his duty under forward instalment contracts for the sale of hops. As to the calculation of damages, the Court said (178 U. S. 20-21):

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason

> of circumstances of which he ought reasonably to have availed himself. * * * If the vendor has to buy instead of to manufacture, the same principle prevails, and *he may show what was the value of the contract by showing for what price he could have made subcontracts,* just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.
>
> *'In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."*

The Court thus observed that the recovery would be "on a basis of cost which might have been increased or diminished by subsequent events," and that plaintiff "may gain, or lose, by the estimation of his damage in advance."

This method of calculation readily lends itself to the assessment of damages for anticipatory breach of lease, and therefore to the valuation of an indemnity contract.

"Contract price" is "rent reserved"; "market price" is the rental value for the remainder of the term.

In *Wm. Filene Sons Co.* v. *Weed,* 245 U. S. 597, this Court referred to "difference between rental value and rent reserved" as a "footing familiar and fair" for liquidating the damages suffered by the landlord by an anticipatory breach of lease.

The *Filene* case, an equity receivership proceeding, concerned a lease of various parcels of adjoining property in Boston. The lease, like present claimant's, "provided for a re-entry in case of a failure to perform any covenant, of bankruptcy, etc., or of a receiver being appointed and not discharged within ninety days"; it further provided that upon termination the lessee would pay damages in the amount of the difference *between the rental value and the rent for the residue of the term* (245 U. S. 597). There were other incidental provisions not material here. A re-

ceiver was appointed and the landlord re-entered. The landlord filed a claim for such damages. The Court held the claim good, saying in part (Holmes, J., at p. 602):

> "The rest of the claim is for damages ultra the twenty thousand dollars a year—*the difference between the rental value at the date of entry and the rent reserved,* less the amount received under the twenty thousand dollar clause. This also was contracted for and we see no reason why it should not be paid. *The Contract was not that all the rent for the term should become presently due; it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair.*" (Citing cases.)

Among the cases cited by this Court in the *Filene* case are several holding (1) that the landlord suffers present damages because of his loss of an advantageous contract, and (2) that such loss should be allowed in liquidation proceedings at the difference between the rental value and rent reserved for the residue of the term. It is significant that the Court cited both cases from jurisdictions in which the doctrine of anticipatory breach of contract is applied to rent agreements (England [now], Minnesota and Michigan), and from one in which damages on indemnity covenants are allowed (Pennsylvania).

The English case cited was *Ex parte Llynvi Coal & Iron Co., In re Hide,* L. R. 7 Ch. App. 28, which arose under the English Bankruptcy Act. The Court there held a landlord entitled to prove a claim in the difference between the rent reserved (£500 in that case) and the rental value (£200) for the residue of the term, a total of £2,348 18s. 6d. Discussing valuation, the Court said:

> "A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at £500 a year, and who is then suddenly deprived of his employment; in such

> a case he would be entitled to prove for £500 a year, minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for £500 a year to be paid to him for the use of land, is entitled to claim £500 a year minus what he can get for the land from another tenant" (James, L. J., at p. 32).

Another case cited by this Court to show the "familiarity" of the "footing" was *Reading Iron Works—Sweatmen's Appeal,* 150 Penna. St. 369. This was a state court insolvency proceeding.

The claimant had let the property to the insolvent Iron Works by a lease under the terms of which

> "the lessor reserved the right to terminate the lease for the breach of any condition or covenant but stipulated that his action in so doing should not relieve the tenant from liability in damages for such a breach". (150 Penna. St. 374).

Upon the insolvency of the Iron Works an assignee for the benefit of creditors was appointed, the lease then having more than eight and one-half years to run. The landlord filed a claim for the present value of his loss. An auditor calculated the difference between the rental value for the remainder of the term and the rent reserved at $40,000.

The Court held the claim should be allowed for that difference, as being the present value of the loss, saying (p. 375):

> "This (the filing of a claim) was in effect an election by the lessor not to stand upon the covenant to pay rent during the remainder of the term, but for the benefit of both lessor and lessee to secure from the abandoned premises all that was practicable, holding the tenant liable in damages only for the actual loss sustained. *The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated.* This the auditor has done. *For these damages the lessor has a present cause of action,* Lothrop v. Reed,* 13 Allen, 294, and

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* *Lothrop* v. *Reed,* 13 Allen, 294 (Mass. 1866), held that in an insolvency proceeding a creditor upon an executory instalment contract might prove for the present value of his loss.

for that reason a right to share in the fund. The demand is not for rent, eo nomine, *for under the agreement the lessor has rented the premises to others. It is for the loss he suffers by reason of the difference of the rentals now obtainable in consequence of the peculiar arrangement and construction of the premises,† and the rental agreed upon as an inducement to him to make the investment for the use of the company."*

Some of the many cases holding difference between rental value and rent reserved the measure of damages in cases of anticipatory breach of lease are *Oldfield* v. *Angeles Brewing Co.,* 62 Wash. 260; *Clarkson* v. *Skidmore,* 46 N. Y. 297; *Huyler's* v. *Ritz-Carlton Restaurant Co.,* 6 Fed. (2d) 404 (D. Del.), and a host of other cases collected by Williston at pages 2492, 2494, Vol. III, *Contracts;* and also the following cases, which arose in proceedings for the liquidation of the defaulting tenant: *Leo* v. *Pearce Stores Co.,* 57 Fed. (2d) 340 (E. D. Mich.); *Kalkoff* v. *Nelson,* 60 Minn. 284;* *McGraw* v. *Union Trust Co.,* 135 Mich. 609;* *Ex parte Blake,* 11 Ch. Div. 572; *In re Carruthers,* 2 Mans. 172.

Hermitage v. Levine Not Applicable.

The Trustee's claim that the 1945 loss must be taken is rested chiefly on a decision of the Court of Appeals of New York, *Hermitage* v. *Levine,* 248 N. Y. 333. In this case a covenant providing that upon re-entry by the landlord the tenant should remain liable for damages was construed as imposing no liability until the end of the term.

This construction was based upon a number of facts not present in this case and also upon the language of the damage covenant in question, which convinced the Court that the parties intentionally agreed that the liability to make up the loss would not accrue until the end of the term.

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† The lessor at the special instance of the tenant had made certain peculiar changes in the premises. This, rather than an economic depression, was responsible for the decreased rental value of the premises.

* Cited with approval by this Court in the *Filene* case.

But in *Hermitage* v. *Levine* the defaulting tenant was not insolvent. The question of the *valuation* of an indemnity covenant was not before the Court. The tenant had not by bankruptcy, insolvency or otherwise repudiated the indemnity covenant, and, so far as appears, there was no reason to believe that it would be unable to meet the obligation when it fell due.

Moreover, the damage covenant in this case, unlike that in *Hermitage* v. *Levine,* is expressly applicable in the event of bankruptcy or insolvency. It is therefore to be supposed that the parties intended to draft a covenant provable in liquidation proceedings, for only in such proceedings could any damages be recovered.

It is a little too much to suggest that by the terms of the indemnity clause here at issue the landlord expected to collect from the corporation *after* insolvency. As the Supreme Court of Minnesota said in *Minneapolis Baseball Co.* v. *City Bank,* 74 Minn. 98, at p. 103:

> "Observation and experience teach us that this possibility is extremely remote, and that insolvent financial concerns rarely survive proceedings in liquidation."

And as said by Judge Lowell in *Ex parte Pollard,* Fed. Case No. 11,252, in 1875:

> "It is easy to show the very great hardship of a negative answer to this question (provability of a claim for damages for anticipatory breach of a contract of employment). No corporation that has been wound up in bankruptcy in this district has ever been revived in such a form as to give its old creditors redress."

PRESENT VALUE OF CONTRACT ASCERTAINED AND ALLOWED IN BANKRUPTCY WITH RESPECT TO BREACH OF COMPARABLE FORWARD CONTRACTS.

As Judge Hand points out in his opinion in the *Manhattan Properties* case:

> "Moreover the whole subject has taken on a new aspect from Central Trust v. Chicago Audtorium, 240

U. S. 581, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. *The uncertainties attendant upon any future instalments were as great as in the case of a covenant to pay rent under a lease.*"

In the petition we referred to some of the other forward contracts, damages with respect to which could be proved in bankruptcy:

A life annuity (*Cobb* v. *Overman*, 109 Fed. 65 [C. C. A. 4th]);

Endorsement of commercial paper (*Maynard* v. *Elliott*, 283 U. S. 273);

Contract of suretyship (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549);

Instalment contract to buy ice (*In re Stern*, 116 Fed. 604 [C. C. A. 2d]);

Employment contracts (*Ex parte Pollard*, Fed. Cas. No. 11,252 [D. Mass.]; *In re Schultz & Guthrie*, 235 Fed. 907 [D. Mass.]);

Contract to buy cotton bagging (*Lesser* v. *Gray*, 236 U. S. 70);

Instalment contract to sell rubber (*In re Portage Rubber Co.*, 296 Fed. 289 [C. C. A. 6th]);

Contract to buy stock (*In re Pettingill*, 137 Fed. 143 [D. Mass.]).

In none of these cases was it regarded as necessary that the loss be actually experienced; all recognize, directly or indirectly, that the victim may prove in the amount of the present value of the contract.

In *In re Stern*, 116 Fed. 604 (C. C. A. 2d), the bankrupt contracted to sell ice in instalments at $2 a ton to various persons. At the time of default the contracts had from two to five years to run. To buy the ice elsewhere then cost from 60 cents to $1.50 more than $2 a ton; the Court said:

"Petitioners could not replace the contract without suffering a direct loss much in excess of $500, and were

creditors for the requisite amount and were not obliged to await the expiration of the time for which the contracts were to continue" (p. 608).

The same Court in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721 (C. C. A. 2d), an equity receivership proceeding, holding that the damages suffered by the Metropolitan Express Company because of the insolvent's default on a forward contract were susceptible of present ascertainment, said:

> "The facts stand out for themselves. *It is manifest that the Metropolitan Express Company met a serious loss.* * * * The Metropolitan Railway Company and its lessee, the City Company, became insolvent and their railroads went into the hands of receivers. *The result was that the Express Company, without any fault on its part or on the part of its assignee, lost the benefit of this contract* * * * (at pp. 742-743) * * * *Manifestly the claimant was entitled to recover the value of its contract"* (p. 745).

The contract in question had thirteen years to run at the time of termination and it appears from the opinion that the profits under it had fluctuated widely during the term of its existence (198 Fed. 736).

INDEMNITY CONTRACTS.

The case of *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, concerned the provability of an indemnity contract. The creditor had not experienced the loss at the time of the bankruptcy and its amount was uncertain, but the loss was held provable. To the same effect is *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.). Both these cases were cited with approval by this Court in *Maynard* v. *Elliott*.

In *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 250 Fed. 327 (C. C. A. 2d), an indemnity contract having many years to run was found to have been anticipatorily breached and damages in the amount of over $38,000,000 assessed (p. 330). The opinion cited at least two bankruptcy cases as authority for the procedure (p. 339).

The Analogy to Employment Contracts and Endorser's Liability.

The analogy between damages upon anticipatory breach of lease and those upon such breach of endorsement of commercial paper and employment contracts should not be overlooked.

In all those cases the total possible claim is strictly limited in amount, viz., the total rent, the face amount of the paper, the total salary. In all the provable damages are the total possible claim less the salvage value available to the victim: the rental value of the real estate, the potential recoupment from the maker, the earning possibilities of the employee.

The same is true of the contract of indemnity or suretyship, where a gross limited amount of damages is liable to be lessened by possible salvage.

The Analogy to Secured Claims.

The analogy between the landlord's claim and that of the secured creditor is also close. Land is often spoken of as the landlord's security.

Now in bankruptcy the secured creditor is allowed to prove "for such sums only as to the courts seem to be owing over and above the value of their securities" (Act, Sec. 57-e).

What is "owing" to the landlord is the aggregate rent for the remainder of the term, discounted, and the value of his "security" is the rental value of the remainder of the term.

To be sure, it is *conceivable* that rents will go up so that eventually no loss will be suffered, ***but it is just as conceivable*** that the security of a secured creditor will so go up in value that by the time the money in a supposed case was actually due to be paid to the creditor, the security would be worth the amount payable.

Courts do not allow themselves to be baffled by such speculations. They take the sum owing, discount it, deduct the present value of the security, and allow the difference.

Landlords, we submit, deserve the same treatment.

DUNBAR v. DUNBAR DISTINGUISHED.

The Trustee has placed some confidence in *Dunbar* v. *Dunbar,* 190 U. S. 340, cited by this Court and *Maynard* v. *Elliott,* 283 U. S. 273, 278, as an illustration of claims not provable because incapable of valuation. The *Dunbar* case concerned a settlement agreement between husband and wife to expire upon the wife's remarriage. There is no present value to such a contract because its term depends upon other than economic considerations.

On the other hand, in cases of this character, there is no difficulty if the standard rule of ascertaining damages for anticipatory breach of contract be applied—a hundred cases recognize that the rental value of the remainder of a term can be ascertained; the Trustee istelf concedes the amount is "definitely measurable."

The English courts also hold that damages upon breach of a settlement agreement unprovable because incapable of valuation (*Linton* v. *Linton,* L. R. 15 Q. B. D. 239), although fully recognizing the ascertainability and provability of damages for bankrupt's anticipatory breach of lease (*Ex parte Llynvi Coal & Iron Co.,* 7 Ch. App. 28, cited by this Court in the *Filene* case).

CONCLUSION.

A writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

State of Law in the Various Circuits.

FIRST CIRCUIT:

In the First Circuit a landlord apparently may prove for damages, as opposed to rent, when the lease provides that the damage clause ripen contemporaneously with the filing of the petition. *R. C. Taylor Trust* v. *Kothe,* 30 Fed. (2d) 77 (C. C. A.). This case was reversed by this Court upon the sole ground that the damages provided in the lease, viz., total unaccrued rent, bore so little relation to actual loss as to be penal in character (280 U. S. 224).

In *Slocum* v. *Soliday,* 183 Fed. 410 (C. C. A.), the Court, approving *In re Roth & Appel,* held a claim for damages unprovable because the damage clause operated only on determination of the lease, and that had not been contemporaneous with the filing of the petition.

The decision in *Maynard* v. *Elliott* has removed the distinction between the *Kothe* and *Slocum* cases, and, if the language of the Court in the *Kothe* case is to be applied, a claim for actual damages upon express covenant, even if it ripened after the filing of the petition, would be provable.

SECOND CIRCUIT:

The last view of the judges of this Circuit appears herein.

THIRD CIRCUIT:

In *In re Caloris Mfg. Co.,* 179 Fed. 722, the Pennsylvania Eastern District Court (McPherson, J.), expressly declining to follow *In re Roth & Appel,* and holding that it was not necessary that liability on a claim be fixed at the time of the filing of the petition, held provable a landlord's claim for damages based upon an express covenant. The *Caloris* case was cited with approval by this Court in *Maynard* v. *Elliott.*

Judge McPherson followed the *Caloris* case in *In re Keith-Gara Co.,* 203 Fed. 585 (E. D. Penna.), again expressly disapproving *In re Roth & Appel,* and was affirmed by the Circuit Court of Appeals, 213 Fed. 450. The Court of Appeals stated *per curiam* that Judge McPherson's opinion was "expressive of the views also reached by this Court."

To the same effect is *In re Orne,* 12 Fed. 779 (E. D. Penna.).

In the absence of express covenant, or upon a covenant accelerating total unaccrued rent, the landlord, in Pennsylvania at least, may refuse a surrender and prove for the total unaccrued rent, but must turn over to the trustee the rents received from the property during the entire term, or he may accept a surrender, which terminates all rights. *Wilson* v. *Pennsylvania Trust Co.,* 114 Fed. 742 (C. C. A.); *Rosenbloom* v. *Uber,* 256 Fed. 584 (C. C. A.); *Electric Appliance Co.* v. *Ellis,* 4 Fed. (2d) 108 (C. C. A.).

The Circuit Court of Appeals in these cases displayed great anxiety to follow the state law, indicating, in view of *Reading Iron Works—Sweatmen's Appeal,* 150 Penna. St. 369, that an indemnity covenant for actual loss would be honored and enforced.

FOURTH CIRCUIT.

No cases found.

FIFTH CIRCUIT:

In *Martin* v. *Orgain,* 174 Fed. 772 (C. C. A.), the Court held provable a landlord's claim for unaccrued rent, deducting rent received from others. Both the lease and a Texas statute provided that the landlord should have a lien for rent due and to become due. The Court distinguished its earlier decision in *Atkins* v. *Wilcox,* 105 Fed. 595, holding invalid a landlord's claim as not due at the time of the filing of the petition, on the ground that in the earlier case the effects of a statutory lien had not been considered.

SIXTH CIRCUIT:

The Circuit Court of Appeals allows or disallows claims as a matter of substantive law. Thus, in *Wells* v. *Twenty-first Street Realty Co.*, 12 Fed. (2d) 237, expressly following *Gardiner* v. *Butler*, the claim was disallowed because under Ohio law a landlord has no claim for damages for anticipatory breach of a lease contract. There was no indemnity covenant in the lease there involved. But in *Schneider* v. *Springman*, 25 Fed. (2d) 255, the Circuit Court of Appeals allowed in full a claim for eleven months' rent unaccrued at the time of the filing of the petition, that being the entire rent due for the unexpired portion of the term. In *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (S. D. Ohio), the Court, referring to the *Filene* and *Gardiner* cases, said (at p. 95):

> "These cases are a complete answer to the contention that, if a landlord cannot prove a claim for anticipatory breach of a lease, he is remediless, for it is clearly within his power to protect himself by an appropriate clause in the lease."

SEVENTH CIRCUIT:

The Circuit Court of Appeals allows landlords' damages in full, apparently irrespective of indemnity covenant. In *In re Chakos*, 24 Fed. (2d) 482, the Court said (p. 485):

> "It is contended by appellant Frawley that the District Court erred in not allowing his claim for rental (1) prior to filing of the petition (as a general claim); (2) from the date of the filing of the petition to the date of vacation of his premises by the trustee (as a part of the costs of administration); and (3) *for the future in so far as he has been damaged by the bankrupt's breach of the lease (as a general claim)*. Clearly the delinquent rental due lessor at the time of the filing of the petition is a general claim, and, if not already allowed as such, should be so allowed by the referee. *Clearly, also, Frawley's claim as to damages should be allowed as a general claim, if and when liquidated.*"

In so far as damages for breach of the lease were concerned, the Court reversed the District Court, and directed further proceedings in conformity with its opinion.

In *In re Desnoyers Shoe Co.,* 227 Fed. 401, the Court had held provable a lessor's claim for such damages as under the terms of a lease of personalty became payable upon termination.

The Seventh Circuit has always been friendly to claims on executory contracts.

EIGHTH CIRCUIT:

In *Watson* v. *Merrill,* 136 Fed. 359, and *Britton* v. *Western Iowa Co.,* 9 Fed. (2d) 488, the Circuit Court of Appeals held "future rent" unprovable.

NINTH CIRCUIT:

Following *In re Roth & Appel,* the Circuit Court of Appeals has held, *Colman Co.* v. *Withoft,* 195 Fed. 250, that a covenant by one lessee to indemnify a co-lessee to the extent of one-half the amount necessary to procure the rescission of a lease was not provable because liability had not been fixed at the time of the filing of the petition.

TENTH CIRCUIT:

No cases found.

No. 506

FILED
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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company, a New Jersey corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

(This petition and brief are substantially the same as those in the *Manhattan Properties* case, except that the discussion of the $4,404.40 item at pages 3 and 25 herein only is additional.)

C. DICKERMAN WILLIAMS,
MORRIS J. BRICKER,
Counsel for Petitioners.

New York, October, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company, a New Jersey corporation.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of Matter Involved.

In 1920 petitioners leased premises at 1402 Farnam Street, Omaha, to the bankrupt corporation, United Cigar Stores Company, for a term ending June 30, 1945. The lease contained a covenant authorizing the landlord to terminate the lease and re-enter upon the adjudication of the tenant as

bankrupt, *inter alia,* and providing that upon such termination the tenant would indemnify the landlord for loss suffered.

The bankrupt was adjudicated, upon its voluntary petition, in the United States District Court for the Southern District of New York, August 29, 1932; on November 26, 1932, petitioners terminated the lease and re-entered (R. 26-28).

Petitioners claim, for $143,615.80, is based upon two items: (1) loss actually suffered between September 1 and November 26, 1932, and (2) difference between rent reserved and rental value for the residue of the term (R. 28-29).

The claim was expunged by Referee Kurtz, whose order was affirmed by the District Court (Coleman, J.) and by the Circuit Court of Appeals (opinion by L. Hand, J.) upon the basis of its decision in *Manhattan Properties, Inc.* v. *Irving Trust Co.,* simultaneously announced.

The Court below, although deciding adversely to petitioners, was not unsympathetic to their claim.

Although Judge Learned Hand did not in terms dissent, he expressed the conclusions of the individual judges as follows in the opinion in the *Manhattan Properties* case:

> "For these reasons my brothers believe that it [its own previous decision in *In re Roth & Appel,* 181 Fed. 667, that landlords' damage claims were unprovable] has become the settled law of this Circuit and that we should adhere to it. For myself, while I recognize the force of this application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer but the fluctuations are less rapid. Some chances must be taken, but that is often so."

Judge Hand's reference to the "authoritative declaration" of the provability of "contingent claims" is shown by the rest of his opinion to be an allusion to the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, that liability need not have accrued at the time of the filing of the petition.

As to the item in petitioners' claim respecting loss suffered prior to November 26, 1932, the $4,404.40 item, Judge Hand said (R. 55-56):

> "Finally, the question arises as to so much of the claim as accrued before the expiration of the time to file claims, which could of course have been pro tanto liquidated in season, like a claim against an indorser of a note which became due before that time. This part of the claim seems to me to present acutely the issue in general, and of course as I should include damages for all installments, a fortiori I should include these. But taken strictly, the doctrine of In re Roth & Appel, 181 Fed. Rep. 667, does not admit of that variant. A claim for future rent must be fixed at petition filed and not become absolute thereafter; the distinction attaches not only to realty itself, but to covenants which concern it or rents issuing from it. We all agree that the claim was either good or bad as a whole, though we recognize that there are stronger reasons for holding good that part which fell due before the expiry of the period to file claims, or to distribute the estate."

Question Presented.

Is a landlord's claim for damages suffered by reason of a bankrupt tenant's default upon a lease which contains an indemnity clause, provable in bankruptcy?

Reasons Relied on for Allowance of the Writ.

1. The present economic depression has made this question one of acute importance which should be passed on by this Court.

The use of the Bankruptcy Act by chain store organizations* to throw almost the entire economic loss suffered by their creditors upon the landlord group has resulted in wholesale defaults on leases throughout the country. There are in addition very many bankruptcies, like that in the *Manhattan Properties* case, in which landlords have lost the benefit of advantageous contracts, but which have not attracted the public attention which the chain store bankruptcies have received. The issue of certiorari to review a decision of the Second Circuit is especially appropriate, because the chain store cases involving leases throughout the nation are under administration in that Circuit. This is especially hard upon chain store landlords in circuits which regard landlords' damage claims as provable.

Indicative of the general interest are the numerous articles on this subject which have recently appeared in legal periodicals.†

2. There is perhaps no question of law upon which there has been greater diversity of view among the lower federal courts than that of the provability of landlords' claims in bankruptcy.

The opinion of Judge Learned Hand (*Manhattan Properties* case) expressly notes that the Circuit Courts of Appeals of the Third Circuit (*In re Keith-Gara Co.*, 203 Fed. 585) and of the Seventh Circuit (*In re Chakos*, 24 Fed. [2d] 482)

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* *In re McCrory Stores Corporation, In re United Cigar Stores Company, In re F. & W. Grand 5-10-25 Cent Stores, Inc.*, and *In re Louis K. Liggett Drug Company* are the best known of the chain store bankruptcy proceedings now pending in the Southern Judicial District of New York.

† *Rent Claims in Bankruptcy*, Schwabacher and Weinstein, 33 COL. L. REV. 213; *Landlords' Claims in Reorganizations*, Douglas and Frank, 42 YALE L. J. 1003; *Landlords' Claim for Damages for Breach of Lease*, Aidlin, 20 CALIF. L. REV. 622; *Effect on Lease of Bankruptcy of Tenant*, Lewis, 65 U. S. L. REV. 611; also CIN. L. REV. 162; 15 MINN. L. REV. 584; 25 ILL. L. REV. 323; 16 VA. L. REV. 610.

have held landlords' claims for damages provable. Judge Hand concludes that in the First, Fifth, Eighth and Ninth Circuits the rule is otherwise. He also mentions the Sixth, but it is believed that the actual decisions in the Sixth Circuit are not hostile to claims on leases containing indemnity covenants. A detailed analysis of the law in the various circuits is annexed to brief filed herewith as an appendix.

This diversity of view has several times been the subject of remark by judges of the lower courts. As long ago as 1911, Judge Hough, sitting in the District Court for the Southern District of New York, said in *In re Roth & Appel*, 174 Fed. 64, at p. 68:

> "The hopeless confusion produced by conflicting decisions on the subject under review requires an authoritative ruling, which this court cannot give. The matter should be promptly taken to the Circuit Court of Appeals, and settled, at least so far as this circuit is concerned."

This sentiment was echoed the following year by Judge McPherson of the Eastern District of Pennsylvania in *In re Caloris Mfg. Co.*, 179 Fed. 722, at p. 723:

> "I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion' and that *an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey.*"

Judge McPherson's decision was diametrically opposed to that of Judge Hough.

And as recently as 1932, Judge Knight, sitting in the Western District of New York, said in *In re Hubbard*, 57 Fed. (2d) 213:

> "As was said by Judge Hough in *In re Roth & Appel*, 174 F. 64, 68, there is 'hopeless confusion' in

> the decisions upon the question of whether claims arising out of leases entered into before and continuing by their terms after adjudication are provable in bankruptcy."

The reason these judges used the expression "hopeless confusion" is perhaps that, although there may be only two rules, there has been an extraordinary variety of reasoning. Even the courts that agree as to result do not agree as to why that result should be reached.

3. The rationale of most of the decisions hostile to landlords' claims has been eliminated by subsequent decisions of this Court.

Because the trustee has the right of affirming leases, some courts have said that the liability of the bankrupt tenant does not accrue until after the filing of the petition. That the trustee's right of affirmation of a forward commercial contract prevents the injured party from proving a claim for the loss of the value of the contract, after disaffirmance, is denied by *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581; and in *Maynard* v. *Elliott,* 283 U. S. 273, this Court held that it was not necessary that the liability have accrued at the time of the filing of the petition.

The leading cases in the circuits holding against provability antedate these decisions of this Court, and, indeed, the majority of the Circuit Court of Appeals in this case felt prevented by the doctrine of *stare decisis* from re-examining its own earlier decisions.

4. It seems manifestly unfair that all other persons damaged by the bankrupt's default on forward contracts should be allowed to prove damages, but that landlords should be excluded. Damages have been held provable with respect to at least the following forward agreements anticipatorily breached by bankruptcy:

> An agreement to pay in instalments over a term of years for a baggage and livery privilege (*Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U. S. 581);

A life annuity (*Cobb* v. *Overman*, 109 Fed. 65 [C. C. A. 4th]);

Endorsement of commercial paper (*Maynard* v. *Elliott*, 283 U. S. 273);

A contract of suretyship (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549);

An instalment contract to buy ice (*In re Stern*, 116 Fed. 604 [C. C. A. 2d]);

Employment contracts (*Ex parte Pollard*, Fed. Cas. No. 11,252 [D. Mass.]; *In re Schultz & Guthrie*, 235 Fed. 907 [D. Mass.]);

A lease of personal property (*In re Desnoyers Shoe Co.*, 227 Fed. 401 [C. C. A. 7th]);

A contract to buy cotton bagging (*Lesser* v. *Gray*, 236 U. S. 70;

An instalment contract to sell rubber (*In re Portage Rubber Co.*, 296 Fed. 289 [C. C. A. 6th];

A contract to buy stock (*In re Pettingill*, 137 Fed. 143 [D. Mass.]).

5. The most recent expressions by this Court favor provability of landlords' damage claims.

In *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, this Court held a landlord's claim for damages for loss of rent unprovable upon the sole ground that the amount stipulated as damages in the lease bore so little relation to actual loss as to be penal. The Court said in part (p. 226):

> "The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

This language suggests that actual damages would be thought provable.

In *Maynard* v. *Elliott*, 283 U. S. 273, this Court stated that the doctrine of *In re Roth & Appel*, 181 Fed. 667, that

the limitation of subdivision (1) of Section 63-a of the Act should be read into subdivision (4) had been "rejected." *In re Roth & Appel* has always been regarded as the leading case against landlord's claims and is the case here followed by the Court below. The opinion in *Maynard* v. *Elliott* cited with approval the cases of *In re Caloris Mfg. Co.*, 179 Fed. 722 (E. D. Penna.); *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.), and *In re Keith-Gara Co.*, 203 Fed. 585 (E. D. Penna.), all of which cases expressly refused to follow *In re Roth & Appel.* The same opinion cited with approval *Moch* v. *Market Street National Bank*, 107 Fed. 897 (C. C. A. 3d), referred to in the *Caloris* case as inconsistent with *In re Roth & Appel.* In both the *Caloris* and *Keith-Gara* cases landlords' damage claims were held provable.

6. The *Manhattan Properties* and *Brown* cases present two popular and usual forms of indemnity covenants. The one is a month-to-month clause, the other a simple loss clause. By exercising jurisdiction in these cases the Court will presumably be able to dispose of the whole subject.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the decree of the Circuit Court of Appeals of the Second Circuit in the above case, and that said decree be reversed.

C. DICKERMAN WILLIAMS,
MORRIS J. BRICKER,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company, a New Jersey corporation.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Referee (R. 32-40) is not reported in the Federal Reporter or Supplement.

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 54-56) has not yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals, sought to be reviewed, was entered on July 24, 1933 (R. 56).

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Facts.

The facts have been stated in the petition.

Specification of Errors.

It is submitted that the Court below erred:

1. In affirming the decree of the District Court.

2. In holding that the proof of claim did not set forth a provable debt and should be expunged.

3. In adhering to the rule of *In re Roth & Appel,* 181 Fed. 667, despite the decision in *Maynard* v. *Elliott,* 283 U. S. 273.

Summary of Argument.

The claim here at issue comes precisely within Section 63-a (4) of the Act, and should be liquidated under Section 63-b.

The fact that the contingency which brought the indemnity clause into play occurred after the filing of the petition is not important (*Maynard* v. *Elliott,* 283 U. S. 273), if, indeed, the filing of the petition itself did not terminate the lease (*Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581).

The tenant was still liable after the termination of the lease and re-entry, by virtue of the indemnity clause (*Chicago Auditorium* case; *Gardiner* v. *Butler & Co.,* 245 U. S. 603).

The damages are not too speculative. They are, as in anticipatory breach of contract cases, the value of the contract, which is measured by the difference between what was payable under it and is obtainable under the best similar forward contract that can then be made (cf. *Roehm* v. *Horst,* 178 U. S. 1), a sum which has been crystallized through constant application in many anticipatory breach of lease cases into the formula, difference between rent reserved and rental value for the remainder of the term (*Wm. Filene Sons Co.* v. *Weed,* 245 U. S. 597).

This is the method of calculating, in bankruptcy and otherwise, damages resulting from anticipatory breach of forward contracts such as those relating to employment, annuities, commodity purchases, indemnities (citing cases), and should be followed here.

POINT I.

The claim comes precisely within Section 63-a (4) of the Act and should be liquidated under Section 63-b.

Section 63 of the Act provides as follows:

> "(a) Debts of the bankruptcy may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied;
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against the estate."

This section was construed by this Court in *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 556, as follows:

> "Within the intendment of the law provable debts include *all liabilities* of the bankrupt *founded on contract*, express or implied, which at the time of the bankruptcy were fixed in amount *or susceptible of liquidation.*"

POINT II.

The fact that re-entry took place after the filing of the petition is irrelevant. No reason appears for not applying the usual rule that bankruptcy was an anticipatory breach of the contract, including the indemnity clause, but, in any event, it is not necessary that debts under Section 63-a (4) be "absolutely owing at the time of the filing of the petition." *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581; *Maynard* v. *Elliott*, 283 U. S. 273; cf. *In re Desnoyers, Shoe Co.*, 227 Fed. 401 (C. C. A. 7th).

In the *Chicago Auditorium* case this Court held that the filing of a petition in bankruptcy constituted the anticipatory breach of a long term contract to pay in instalments for a livery privilege.

The doctrine of anticipatory breach of contract has sometimes been held inapplicable to leases on the ground that the trustee had the privilege of adopting the lease, and that the lease could therefore not be terminated until the trustee disaffirmed the lease.

But obviously this fact cannot distinguish the lease situation from the *Chicago Auditorium* case. The trustee had the same privilege of affirmance with respect to the executory livery privilege agreement there involved and also had that privilege in the numerous executory commercial contracts with respect to which proof of damages has been allowed (discussed *infra*, pp. 21-23).

The *Chicago Auditorium* case has been distinguished on the ground that it applies to personal covenants only. This might be a valid basis of distinction with respect to leases not containing a damage covenant, but such covenants are personal and survive termination of the lease (*Wm. Filene Sons Co.* v. *Weed*, 245 U. S. 597; *Gardiner* v. *Butler & Co.*, 245 U. S. 603). This point is more fully discussed *infra* (pp. 13-15).

But the question as to whether or not the doctrine of the *Chicago Auditorium* case applies in lease cases is no longer important.

The requirement that the liability exist at the time of the filing of the petition against the bankrupt in order that a claim based upon express contract be provable was removed by the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, in which the case of *In re Roth & Appel* and its reasoning were specifically condemned. The Court there held that the limitation of subdivision (1) that claims evidenced by judgments and instruments in writing be "absolutely owing at the time of the filing of the petition" *should not be read into subdivision (4)*. In the *Maynard* case the bankrupt was liable as an endorser on a note that was by its terms not due *until over a year after the adjudication in bankruptcy.* This Court (opinion by Stone, J.) held that the Bankruptcy Act should be construed "to relieve the honest debtor from the weight of oppressive indebtedness," and that giving due weight to such purpose the claim could not be held unprov-

able (pp. 277-278). *The Court expressly referred to the case of In re Roth & Appel* (at p. 277) *and stated that the contention that the limitation of subdivision* (*a*) (*1*) *should be read into subdivision* (*a*) (*4*) *had been "rejected."*

Application of this ruling is especially appropriate in the present case, involving as it does a liability that was in fact fixed as an immediate and direct result of the bankruptcy, a result contemplated by the lease. In *Maynard* v. *Elliott* liability was fixed by the default of the maker, an event entirely independent of the bankruptcy, and not in fact even substantially coincident therewith, but occurring after the period for the filing of claims had expired.

The courts have often indicated an intention to regard liabilities precipitated by the bankruptcy itself as provable. "But we agree with what was said in *Ex parte Pollard*, 2 Low. 411, Fed. Cas. No. 11,252, that it would be an 'unnecessary and false nicety' to hold that because it was the act of filing that wrought the breach, therefore there was no breach at the time of the filing of the petition" (*Chicago Auditorium* case, 240 U. S. 592).

And where bankruptcy authorized the termination of a contract, the termination has been held to relate back to the filing of the petition (*In re Desnoyers Show Co.*, 227 Fed. 401 [C. C. A. 7th]).

POINT III.

The covenant of indemnity was a personal covenant, not a rent covenant, and is therefore not objectionable under the *Chicago Auditorium* case, but is provable within its doctrine.

Petitioners rest their claim not upon a covenant to *pay rent*, but upon a covenant of indemnity, a personal covenant. Such a covenant is for damages and not for rent.

Filene case, 245 U. S. 597, 602 ("It is not for rent at all");

Hermitage Co. v. *Lœvine*, 248 N. Y. 333.

Consequently, it is not objectionable under the *Chicago Auditorium* case as a rent covenant, but is a personal covenant, and may be made the subject of a claim in bankruptcy.

In the *Chicago Auditorium* case this Court said, mentioning certain cases holding claims relating to real estate not provable in bankruptcy (240 U. S. 590):

> "Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the meere personalty.' Co. Litt. 292, b, Sec. 513."

This remark is sometimes claimed to mean that there is some arbitrary, unexplained and inexplicable feature of contracts relating to real estate that withdraws them from the operation of Sections 63-a (4) and 63-b. Reference to subsequent decisions of the Court and to the quoted section of Co. Litt. answers this argument.

As explained in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the Court's remark was simply directed to the point that at common law the doctrine of anticipatory breach of contract was not applied in the ordinary lease case—"*in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee*" (245 U. S. 605).

But that the Court did not mean to indicate that a specific promise by the lessee to indemnify actual loss suffered by the lessor was not enforceable to recover the present value of his loss computed according to conventional method is shown by the fact that in the *Gardiner* case itself an equity receivership proceeding, which related to two Massachusetts leases, *such damages were allowed as to the lease containing an indemnity covenant, and not allowed as to the lease not containing such covenant.*

And in the *Filene* case the Court expressly held that an agreement to pay compensatory damages upon termination of a lease due to the tenant's default was a "personal covenant."

The holding in the *Filene* case, that an agreement by the tenant to pay compensatory damages upon termination of the lease was a personal covenant, is in accord with the general rule that agreements in leases other than for rent in the true sense "touch" "meere personalty" as opposed to "realty."

Witton v. *Bye,* Cro. Jac. 486 (K. B.);
Baynton v. *Bobbett,* 2 Vent. 67 (C. B.);
Newton v. *Weeks,* Aleyn 79 (K. B.);
Clarke v. *Peppin,* 2 Vent. 97 (C. B.);
Anonymous Case, Noy. 60 (Q. B.);
Anonymous Case, 12 Mod. 73 (K. B.);
Lambert v. *Norris,* 2 M. & W. 333 (Exch.).

We refrain at this time from extended discussion of Co. Litt. 292, b, Sec. 213. That section does not hold by any means that no covenant in a lease can survive non-enjoyment.

POINT IV.

The Trustee's argument that the loss is too speculative for assessment overlooks familiar methods of ascertaining damages in cases of anticipatory breach of contract and in liquidating claims in bankruptcy. It is not and cannot be required that the loss be actually experienced, but the value of the contract is determined.

The Trustee, in arguing that the loss is incapable of valuation, does not contend that the value of the remainder of the term cannot be definitely ascertained—indeed in its brief in the *Brown* case below it characterized "difference between rental value and rent reserved" as a "definitely measurable sum."

Rather, it asserts that it is impossible at the present time to ascertain what the actual loss will be in 1945, when the term expires.

This argument, petitioners submit, overlooks the whole doctrine of assessing damages for anticipatory breach of contract, and that of liquidating claims in bankruptcy.

The mere fact that suits for anticipatory breach of contract and liquidation in bankruptcy of obligations due *in futuro* are permitted shows it is not regarded as essential to the establishment of damage in either instance that the loss actually have been experienced.

It is in liquidating claims in bankruptcy and in ascertaining damages for anticipatory breach of contract that the courts principally have occasion to determine the present value of future obligations. On the subject of ascertaining present values, bankruptcy and anticipatory breach of contract cases are cited interchangeably, as, for instance, in *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 250 Fed. 327, at p. 339 (C. C. A. 2d). The decision of this Court in *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, that bankruptcy was an anticipatory breach of contract further assimilated the two situations in so far as the calculation of damages is concerned.

It is axiomatic in both cases that it is unnecessary that the loss actually be experienced.

That the injured person need not wait until the expiration of the time for the execution of an advantageous executory contract was the decision of the English courts in the famous case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678.

In *Roehm* v. *Horst*, 178 U. S. 1, this Court approved and followed the case of *Hochster* v. *De la Tour*. Its opinion expressly recognized that plaintiff's loss had not been actually experienced at the time of the trial. The case concerned the repudiation by the buyer of his duty under forward instalment contracts for the sale of hops. As to the calculation of damages, the Court said (178 U. S. 20-21):

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason

> of circumstances of which he ought reasonably to have availed himself. * * * If the vendor has to buy instead of to manufacture, the same principle prevails, and *he may show what was the value of the contract by showing for what price he could have made subcontracts,* just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.
>
> *In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."*

The Court thus observed that the recovery would be "on a basis of cost which might have been increased or diminished by subsequent events," and that plaintiff "may gain, or lose, by the estimation of his damage in advance."

This method of calculation readily lends itself to the assessment of damages for anticipatory breach of lease, and therefore to the valuation of an indemnity contract.

"Contract price" is "rent reserved"; "market price" is the rental value for the remainder of the term.

In *Wm. Filene Sons Co.* v. *Weed,* 245 U. S. 597, this Court referred to "difference between rental value and rent reserved" as a "footing familiar and fair" for liquidating the damages suffered by the landlord by an anticipatory breach of lease.

The *Filene* case, an equity receivership proceeding, concerned a lease of various parcels of adjoining property in Boston. The lease, like present claimant's, "provided for a re-entry in case of a failure to perform any covenant, of bankruptcy, etc., or of a receiver being appointed and not discharged within ninety days"; it further provided that upon termination the lessee would pay damages in the amount of the difference *between the rental value and the rent for the residue of the term* (245 U. S. 597). There were other incidental provisions not material here. A re-

ceiver was appointed and the landlord re-entered. The landlord filed a claim for such damages. The Court held the claim good, saying in part (Holmes, J., at p. 602):

> "The rest of the claim is for damages ultra the twenty thousand dollars a year—*the difference between the rental value at the date of entry and the rent reserved,* less the amount received under the twenty thousand dollar clause. This also was contracted for and we see no reason why it should not be paid. *The Contract was not that all the rent for the term should become presently due; it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair.*" (Citing cases.)

Among the cases cited by this Court in the *Filene* case are several holding (1) that the landlord suffers present damages because of his loss of an advantageous contract, and (2) that such loss should be allowed in liquidation proceedings at the difference between the rental value and rent reserved for the residue of the term. It is significant that the Court cited both cases from jurisdictions in which the doctrine of anticipatory breach of contract is applied to rent agreements (England [now], Minnesota and Michigan), and from one in which damages on indemnity covenants are allowed (Pennsylvania).

The English case cited was *Ex parte Llynvi Coal & Iron Co., In re Hide,* L. R. 7 Ch. App. 28, which arose under the English Bankruptcy Act. The Court there held a landlord entitled to prove a claim in the difference between the rent reserved (£500 in that case) and the rental value (£200) for the residue of the term, a total of £2,348 18s. 6d. Discussing valuation, the Court said:

> "A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at £500 a year, and who is then suddenly deprived of his employment; in such

> a case he would be entitled to prove for £500 a year, minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for £500 a year to be paid to him for the use of land, is entitled to claim £500 a year minus what he can get for the land from another tenant" (James, L. J., at p. 32).

Another case cited by this Court to show the "familiarity" of the "footing" was *Reading Iron Works—Sweatmen's Appeal,* 150 Penna. St. 369. This was a state court insolvency proceeding.

The claimant had let the property to the insolvent Iron Works by a lease under the terms of which

> "the lessor reserved the right to terminate the lease for the breach of any condition or covenant but stipulated that his action in so doing should not relieve the tenant from liability in damages for such a breach" (150 Penna. St. 374).

Upon the insolvency of the Iron Works an assignee for the benefit of creditors was appointed, the lease then having more than eight and one-half years to run. The landlord filed a claim for the present value of his loss. An auditor calculated the difference between the rental value for the remainder of the term and the rent reserved at $40,000.

The Court held the claim should be allowed for that difference, as being the present value of the loss, saying (p. 375):

> "This (the filing of a claim) was in effect an election by the lessor not to stand upon the covenant to pay rent during the remainder of the term, but for the benefit of both lessor and lessee to secure from the abandoned premises all that was practicable, holding the tenant liable in damages only for the actual loss sustained. *The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated.* This the auditor has done. *For these damages the lessor has a present cause of action,* Lothrop v. Reed,* 13 Allen, 294, and

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* *Lothrop* v. *Reed,* 13 Allen, 294 (Mass. 1866), held that in an insolvency proceeding a creditor upon an executory instalment contract might prove for the present value of his loss.

for that reason a right to share in the fund. The demand is not for rent, eo nomine, *for under the agreement the lessor has rented the premises to others. It is for the loss he suffers by reason of the difference of the rentals now obtainable in consequence of the peculiar arrangement and construction of the premises,*† *and the rental agreed upon as an inducement to him to make the investment for the use of the company."*

Some of the many cases holding difference between rental value and rent reserved the measure of damages in cases of anticipatory breach of lease are *Oldfield* v. *Angeles Brewing Co.,* 62 Wash. 260; *Clarkson* v. *Skidmore,* 46 N. Y. 297; *Huyler's* v. *Ritz-Carlton Restaurant Co.,* 6 Fed. (2d) 404 (D. Del.), and a host of other cases collected by Williston at pages 2492, 2494, Vol. III, *Contracts;* and also the following cases, which arose in proceedings for the liquidation of the defaulting tenant: *Leo* v. *Pearce Stores Co.,* 57 Fed. (2d) 340 (E. D. Mich.); *Kalkoff* v. *Nelson,* 60 Minn. 284;* *McGraw* v. *Union Trust Co.,* 135 Mich. 609;* *Ex parte Blake,* 11 Ch. Div. 572; *In re Carruthers,* 2 Mans. 172.

Hermitage v. Levine Not Applicable.

The Trustee's claim that the 1945 loss must be taken is rested chiefly on a decision of the Court of Appeals of New York, *Hermitage* v. *Levine,* 248 N. Y. 333. In this case a covenant providing that upon re-entry by the landlord the tenant should remain liable for damages was construed as imposing no liability until the end of the term.

This construction was based upon a number of facts not present in this case and also upon the language of the damage covenant in question, which convinced the Court that the parties intentionally agreed that the liability to make up the loss would not accrue until the end of the term.

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† The lessor at the special instance of the tenant had made certain peculiar changes in the premises. This, rather than an economic depression, was responsible for the decreased rental value of the premises.

* Cited with approval by this Court in the *Filene* case.

But in *Hermitage* v. *Levine* the defaulting tenant was not insolvent. The question of the *valuation* of an indemnity covenant was not before the Court. The tenant had not by bankruptcy, insolvency or otherwise repudiated the indemnity covenant, and, so far as appears, there was no reason to believe that it would be unable to meet the obligation when it fell due.

Moreover, the damage covenant in [redacted] unlike that in *Hermitage* v. *Levine,* is expressly a[redacted]le in the event of bankruptcy or insolvency. It is [redacted]ore to be supposed that the parties intended to draf[redacted]venant provable in liquidation proceedings, for only in [redacted]ch proceedings could any damages be recovered.

It is a little too much to suggest that by the terms of the indemnity clause here at issue the landlord expected to collect from the corporation *after* insolvency. As the Supreme Court of Minnesota said in *Minneapolis Baseball Co.* v. *City Bank,* 74 Minn. 98, at p. 103:

> "Observation and experience teach us that this possibility is extremely remote, and that insolvent financial concerns rarely survive proceedings in liquidation."

And as said by Judge Lowell in *Ex parte Pollard,* Fed. Case No. 11,252, in 1875:

> "It is easy to show the very great hardship of a negative answer to this question (provability of a claim for damages for anticipatory breach of a contract of employment). No corporation that has been wound up in bankruptcy in this district has ever been revived in such a form as to give its old creditors redress."

PRESENT VALUE OF CONTRACT ASCERTAINED AND ALLOWED IN BANKRUPTCY WITH RESPECT TO BREACH OF COMPARABLE FORWARD CONTRACTS.

As Judge Hand points out in his opinion in the *Manhattan Properties* case:

> "Moreover the whole subject has taken on a new aspect from Central Trust v. Chicago Auditorium, 240

U. S. 581, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. *The uncertainties attendant upon any future instalments were as great as in the case of a covenant to pay rent under a lease.*"

In the petition we referred to some of the other forward contracts, damages with respect to which could be proved in bankruptcy:

A life annuity (*Cobb* v. *Overman*, 109 Fed. 65 [C. C. A. 4th]);

Endorsement of commercial paper (*Maynard* v. *Elliott*, 283 U. S. 273);

Contract of suretyship (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549);

Instalment contract to buy ice (*In re Stern*, 116 Fed. 604 [C. C. A. 2d]);

Employment contracts (*Ex parte Pollard*, Fed. Cas. No. 11,252 [D. Mass.]; *In re Schultz & Guthrie*, 235 Fed. 907 [D. Mass.]);

Contract to buy cotton bagging (*Lesser* v. *Gray*, 236 U. S. 70);

Instalment contract to sell rubber (*In re Portage Rubber Co.*, 296 Fed. 289 [C. C. A. 6th]);

Contract to buy stock (*In re Pettingill*, 137 Fed. 143 [D. Mass.]).

In none of these cases was it regarded as necessary that the loss be actually experienced; all recognize, directly or indirectly, that the victim may prove in the amount of the present value of the contract.

In *In re Stern*, 116 Fed. 604 (C. C. A. 2d), the bankrupt contracted to sell ice in instalments at $2 a ton to various persons. At the time of default the contracts had from two to five years to run. To buy the ice elsewhere then cost from 60 cents to $1.50 more than $2 a ton; the Court said:

"Petitioners could not replace the contract without suffering a direct loss much in excess of $500, and were

creditors for the requisite amount and were not obliged to await the expiration of the time for which the contracts were to continue" (p. 608).

The same Court in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721 (C. C. A. 2d), an equity receivership proceeding, holding that the damages suffered by the Metropolitan Express Company because of the insolvent's default on a forward contract were susceptible of present ascertainment, said:

> "The facts stand out for themselves. *It is manifest that the Metropolitan Express Company met a serious loss.* * * * The Metropolitan Railway Company and its lessee, the City Company, became insolvent and their railroads went into the hands of receivers. *The result was that the Express Company, without any fault on its part or on the part of its assignee, lost the benefit of this contract* * * * (at pp. 742-743) * * * *Manifestly the claimant was entitled to recover the value of its contract"* (p. 745).

The contract in question had thirteen years to run at the time of termination and it appears from the opinion that the profits under it had fluctuated widely during the term of its existence (198 Fed. 736).

INDEMNITY CONTRACTS.

The case of *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, concerned the provability of an indemnity contract. The creditor had not experienced the loss at the time of the bankruptcy and its amount was uncertain, but the loss was held provable. To the same effect is *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.). Both these cases were cited with approval by this Court in *Maynard* v. *Elliott*.

In *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 250 Fed. 327 (C. C. A. 2d), an indemnity contract having many years to run was found to have been anticipatorily breached and damages in the amount of over $38,000,000 assessed (p. 330). The opinion cited at least two bankruptcy cases as authority for the procedure (p. 339).

The Analogy to Employment Contracts and Endorser's Liability.

The analogy between damages upon anticipatory breach of lease and those upon such breach of endorsement of commercial paper and employment contracts should not be overlooked.

In all those cases the total possible claim is strictly limited in amount, viz., the total rent, the face amount of the paper, the total salary. In all the provable damages are the total possible claim less the salvage value available to the victim: the rental value of the real estate, the potential recoupment from the maker, the earning possibilities of the employee.

The same is true of the contract of indemnity or suretyship, where a gross limited amount of damages is liable to be lessened by possible salvage.

The Analogy to Secured Claims.

The analogy between the landlord's claim and that of the secured creditor is also close. Land is often spoken of as the landlord's security.

Now in bankruptcy the secured creditor is allowed to prove "for such sums only as to the courts seem to be owing over and above the value of their securities" (Act, Sec. 57-e).

What is "owing" to the landlord is the aggregate rent for the remainder of the term, discounted, and the value of his "security" is the rental value of the remainder of the term.

To be sure, it is *conceivable* that rents will go up so that eventually no loss will be suffered, *but it is just as conceivable* that the security of a secured creditor will so go up in value that by the time the money in a supposed case was actually due to be paid to the creditor, the security would be worth the amount payable.

Courts do not allow themselves to be baffled by such speculations. They take the sum owing, discount it, deduct the present value of the security, and allow the difference.

Landlords, we submit, deserve the same treatment.

Dunbar v. Dunbar Distinguished.

The Trustee has placed some confidence in *Dunbar* v. *Dunbar*, 190 U. S. 340, cited by this Court and *Maynard* v. *Elliott*, 283 U. S. 273, 278, as an illustration of claims not provable because incapable of valuation. The *Dunbar* case concerned a settlement agreement between husband and wife to expire upon the wife's remarriage. There is no present value to such a contract because its term depends upon other than economic considerations.

On the other hand, in cases of this character, there is no difficulty if the standard rule of ascertaining damages for anticipatory breach of contract be applied—a hundred cases recognize that the rental value of the remainder of a term can be ascertained; the Trustee istelf concedes the amount is "definitely measurable."

The English courts also hold that damages upon breach of a settlement agreement unprovable because incapable of valuation (*Linton* v. *Linton*, L. R. 15 Q. B. D. 239), although fully recognizing the ascertainability and provability of damages for bankrupt's anticipatory breach of lease (*Ex parte Llynvi Coal & Iron Co.*, 7 Ch. App. 28, cited by this Court in the *Filene* case).

POINT V.

Under any circumstances that part of the claim for $4,404.40 is provable.

Of the total claim, $4,404.40 is for loss suffered to the date of termination of the lease. The figure is reached by deducting actual income from rent reserved for the months of September, October and November to November 26, 1933. Certainly there is no doubt of the accrued nature of the loss and its susceptibility of liquidation. Nor had there been non-enjoyment, or at least non-availability of enjoyment, up to the time of re-entry.

It seems positively ruthless to disallow this item, and that paragraph of his opinion relating to this item indicates that Judge Hand thought so too.

CONCLUSION.

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

State of Law in the Various Circuits.

FIRST CIRCUIT:

In the First Circuit a landlord apparently may prove for damages, as opposed to rent, when the lease provides that the damage clause ripen contemporaneously with the filing of the petition. *R. C. Taylor Trust* v. *Kothe,* 30 Fed. (2d) 77 (C. C. A.). This case was reversed by this Court upon the sole ground that the damages provided in the lease, viz., total unaccrued rent, bore so little relation to actual loss as to be penal in character (280 U. S. 224).

In *Slocum* v. *Soliday,* 183 Fed. 410 (C. C. A.), the Court, approving *In re Roth & Appel,* held a claim for damages unprovable because the damage clause operated only on determination of the lease; and that had not been contemporaneous with the filing of the petition.

The decision in *Maynard* v. *Elliott* has removed the distinction between the *Kothe* and *Slocum* cases, and, if the language of the Court in the *Kothe* case is to be applied, a claim for actual damages upon express covenant, even if it ripened after the filing of the petition, would be provable.

SECOND CIRCUIT:

The last view of the judges of this Circuit appears herein.

THIRD CIRCUIT:

In *In re Caloris Mfg. Co.,* 179 Fed. 722, the Pennsylvania Eastern District Court (McPherson, J.), expressly declining to follow *In re Roth & Appel,* and holding that it was not necessary that liability on a claim be fixed at the time of the filing of the petition, held provable a landlord's claim for damages based upon an express covenant. The *Caloris* case was cited with approval by this Court in *Maynard* v. *Elliott.*

Judge McPherson followed the *Caloris* case in *In re Keith-Gara Co.,* 203 Fed. 585 (E. D. Penna.), again expressly disapproving *In re Roth & Appel,* and was affirmed by the Circuit Court of Appeals, 213 Fed. 450. The Court of Appeals stated *per curiam* that Judge McPherson's opinion was "expressive of the views also reached by this Court."

To the same effect is *In re Orne,* 12 Fed. 779 (E. D. Penna.).

In the absence of express covenant, or upon a covenant accelerating total unaccrued rent, the landlord, in Pennsylvania at least, may refuse a surrender and prove for the total unaccrued rent, but must turn over to the trustee the rents received from the property during the entire term, or he may accept a surrender, which terminates all rights. *Wilson* v. *Pennsylvania Trust Co.,* 114 Fed. 742 (C. C. A.); *Rosenbloom* v. *Uber,* 256 Fed. 584 (C. C. A.); *Electric Appliance Co.* v. *Ellis,* 4 Fed. (2d) 108 (C. C. A.).

The Circuit Court of Appeals in these cases displayed great anxiety to follow the state law, indicating, in view of *Reading Iron Works—Sweatmen's Appeal,* 150 Penna. St. 369, that an indemnity covenant for actual loss would be honored and enforced.

FOURTH CIRCUIT.

No cases found.

FIFTH CIRCUIT:

In *Martin* v. *Orgain,* 174 Fed. 772 (C. C. A.), the Court held provable a landlord's claim for unaccrued rent, deducting rent received from others. Both the lease and a Texas statute provided that the landlord should have a lien for rent due and to become due. The Court distinguished its earlier decision in *Atkins* v. *Wilcox,* 105 Fed. 595, holding invalid a landlord's claim as not due at the time of the filing of the petition, on the ground that in the earlier case the effects of a statutory lien had not been considered.

SIXTH CIRCUIT:

The Circuit Court of Appeals allows or disallows claims as a matter of substantive law. Thus, in *Wells* v. *Twenty-first Street Realty Co.*, 12 Fed. (2d) 237, expressly following *Gardiner* v. *Butler*, the claim was disallowed because under Ohio law a landlord has no claim for damages for anticipatory breach of a lease contract. There was no indemnity covenant in the lease there involved. But in *Schneider* v. *Springman*, 25 Fed. (2d) 255, the Circuit Court of Appeals allowed in full a claim for eleven months' rent unaccrued at the time of the filing of the petition, that being the entire rent due for the unexpired portion of the term. In *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (S. D. Ohio), the Court, referring to the *Filene* and *Gardiner* cases, said (at p. 95):

> "These cases are a complete answer to the contention that, if a landlord cannot prove a claim for anticipatory breach of a lease, he is remediless, for it is clearly within his power to protect himself by an appropriate clause in the lease."

SEVENTH CIRCUIT:

The Circuit Court of Appeals allows landlords' damages in full, apparently irrespective of indemnity covenant. In *In re Chakos*, 24 Fed. (2d) 482, the Court said (p. 485):

> "It is contended by appellant Frawley that the District Court erred in not allowing his claim for rental (1) prior to filing of the petition (as a general claim); (2) from the date of the filing of the petition to the date of vacation of his premises by the trustee (as a part of the costs of administration); and (3) *for the future in so far as he has been damaged by the bankrupt's breach of the lease (as a general claim)*. Clearly the delinquent rental due lessor at the time of the filing of the petition is a general claim, and, if not already allowed as such, should be so allowed by the referee. *Clearly, also, Frawley's claim as to damages should be allowed as a general claim, if and when liquidated.*"

In so far as damages for breach of the lease were concerned, the Court reversed the District Court, and directed further proceedings in conformity with its opinion.

In *In re Desnoyers Shoe Co.*, 227 Fed. 401, the Court had held provable a lessor's claim for such damages as under the terms of a lease of personalty became payable upon termination.

The Seventh Circuit has always been friendly to claims on executory contracts.

EIGHTH CIRCUIT:

In *Watson* v. *Merrill*, 136 Fed. 359, and *Britton* v. *Western Iowa Co.*, 9 Fed. (2d) 488, the Circuit Court of Appeals held "future rent" unprovable.

NINTH CIRCUIT:

Following *In re Roth & Appel*, the Circuit Court of Appeals has held, *Colman Co.* v. *Withoft*, 195 Fed. 250, that a covenant by one lessee to indemnify a co-lessee to the extent of one-half the amount necessary to procure the rescission of a lease was not provable because liability had not been fixed at the time of the filing of the petition.

TENTH CIRCUIT:

No cases found.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the United States Circuit Court of Appeals are reported in 66 Fed. (2nd) 470, 473.

JURISDICTION

The judgments of the Circuit Court of Appeals to be reviewed were entered July 24, 1933 (No. 505, R. 30; No. 506, R. 39). The petitions for certiorari were filed October 5, 1933. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Stated broadly, the question is whether, if a tenant is adjudicated a bankrupt, his landlord's claim for damages for loss of future rents is a provable debt in bankruptcy.

STATUTES INVOLVED

The pertinent provisions of Section 63 of the Bankruptcy Act are as follows:

> "*Debts provable against.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

Section 1(11) provides:

> "'Debt' shall include any debt, demand or claim provable in bankruptcy."

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts," with the exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stats. 562, as amended; U. S. C. A., Title 11, Sections 1, 35 and 103.)

STATEMENT

No. 505. Manhattan Properties, Inc.—On March 18, 1932, Oliver A. Olson Co., Inc. was adjudicated a bankrupt in the Southern District of New York. On December 20, 1927, one Reid, then owner of certain real estate in New York City, leased it to the Oliver A. Olson Co., Inc., at a stated rental for a term of nine years and eight months, beginning February 1, 1928, and ending October 1, 1937 (R. 3). In December, 1928, the premises were conveyed to Manhattan Properties, Inc. subject to the lease. The rent was paid to and including January, 1932. The tenant defaulted in the rent for February and March, 1932, and then an involuntary petition was filed against it and it was adjudicated a bankrupt. The Manhattan Properties, Inc. then filed its claim, one item of which was $25,000 damages for loss of future rentals. The total rent reserved for the balance of the term after bankruptcy was $58,000. The claimant alleged that the present rental value for the remainder of the term was $33,000, and asked to have its claim liquidated for the difference (R. 2).

The lease (R. 3) contained a provision (R. 13) that if the tenant should default in the payment of rent

> "or if the Tenant abandon said premises, if said premises become vacant, if the Tenant become insolvent, if the Tenant make an assignment for the benefit of creditors, if bankruptcy proceedings be instituted by or against the Tenant * * * then it shall be lawful for the Landlord, or the Landlord's agent, without notice, to re-enter said premises * * * and in the event of such re-entry or the cessation or cancellation or such estate, lease, renewal or extension, the Tenant, * * * hereby waives any and all right to redemption now or hereafter given by any law. The Landlord may, after obtaining possession of said premises, re-let the same or any part thereof as the agent of the Tenant for the whole or any part of the term herein demised, from time to time, as the Landlord may deem best. * * * The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in

> which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The referee in bankruptcy expunged and disallowed so much of the claim as sought damages for loss of future rents (R. 17), on the ground that, as a matter of law, it did not constitute a provable claim in bankruptcy (R. 20). On petition to review, the referee's order was affirmed by the United States District Court (R. 21). On appeal to the United States Circuit Court of Appeals, the order of the District Court was affirmed (R. 25).

In *No. 506, Brown* v. *Irving Trust Company,* the bankruptcy proceeding was commenced August 29, 1932, in the Southern District of New York by the filing of a voluntary petition by the United Cigar Stores Company of America, a New Jersey corporation (R. 1). The adjudication followed on the same day. In that case the lease under which the bankrupt held was dated June 14, 1920, covering real estate in the State of Nebraska for a term expiring June 30, 1945, at a stated annual rental payable in monthly instalments (R. 3). The lease contained a covenant that on default by the lessee or if the lessee shall be adjudicated a bankrupt, the lessor may enter and re-possess the premises

> "and upon entry as aforesaid, this lease shall terminate, and the Lessee covenants that in case of termination, it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination during the residue of the term above specified."

On November 23, 1932, the trustee in bankruptcy disaffirmed the lease (R. 21). On November 26, 1932,

the landlord took possession and proceeded to collect rents from occupants of the premises (R. 21). On January 13, 1933, the landlord filed a proof of claim which, as amended (R. 19), included an item of $4,404.40, representing the difference between rent accrued to date of re-entry and the collections from occupants of the premises during that period, and an item of $140,615.80 (R. 21), representing the difference between the alleged rental value for the remainder of the term after re-entry and the rent reserved in the lease. Application was made by the landlord for liquidation of his claim under Section 63(b) of the Bankruptcy Act (R. 16). The trustee applied to have the claim expunged and disallowed (R. 18). The referee expunged and disallowed both items for damages for loss of future rent after the date of filing the petition, holding that as a matter of law they were not provable (R. 23, 29). On petition for review, the action of the referee was affirmed by the District Court (R. 33), and on appeal, the United States Circuit Court of Appeals affirmed the judgment below (R. 39).

SPECIFICATION OF ERRORS

The court below erred in each case:

(1) In holding that the claim for damages for loss of future rents was not, as a matter of law, a provable debt.

(2) In adhering to the rule of *In re Roth & Appel,* 181 Fed. 667.

(3) In affirming the decree of the District Court disallowing the claim.

SUMMARY OF ARGUMENT

A lease is a contract within the meaning of the Bankruptcy Act. The purpose of the Act, which is to clear the bankrupt of all obligations, requires that the landlord's claim be provable and dischargeable.

I. The decisions below, holding that a landlord's claim for loss of future rents is not a provable claim in the bankruptcy of his tenant, were made on the authority of its former decision in *Re Roth & Appel,* the grounds for which were that such claims are contingent, and the loss not readily ascertainable. Both grounds have been destroyed by decisions of this Court. The lower court substantially admits that.

II. The other circuits are in conflict. In those rejecting such claims, the grounds assigned are

(1) That the claims are subject to contingencies;

(2) That the amount of loss is not readily susceptible of ascertainment; or

(3) That reentry by a landlord extinguishes the covenant to pay rent.

III. The correct rule is to be found in the Bankruptcy Act as interpreted by this Court. Congress has power to make such claims provable. The question is one of interpretation of the statute. As long ago as 1915 this Court held that contingency is no obstacle to provability, that the purposes of the Act are to relieve debtors of all obligations and to allow their obligees to participate in the distribution of assets, and that provable debts include all obligations on contract, susceptible of liquidation, whether or not contingent.

IV. The above principles announced in the decisions of this Court lead to the conclusion that such claims are provable.

V. There is no reason why a distinction should be made between claims of landlords for loss of future rents, and claims on other types of executory contracts.

VI. There is no sound reason consistent with the purposes of the Bankruptcy Act, why distinction should be made between leases which contain indemnity covenants, preserving the liability of the tenant after reentry, and leases which do not. In either case the purpose of the Act is defeated if the bankrupt remains liable after discharge. In either case the effect of the bankruptcy is to disable the tenant to perform, and to inflict a loss on the landlord.

VII. If the narrower ground be adopted, and covenants of indemnity held necessary to allow proof of such claims, the leases here involved contain them.

VIII. Notwithstanding the rule to the contrary in some circuits, this Court should not refuse to hold such claims provable. A decision either way will overturn the rule in some circuits. The question has never really been at rest in any circuit. A rule of property is not involved. Provability has depended on the location of the bankruptcy proceedings.

IX. Under the English system, such claims have been provable for more than sixty years, without regard to the existence of indemnity covenants.

X. The amendment of March 3, 1933, to the Bankruptcy Act declares such claims to be provable debts to be liquidated under section 63(b). That amendment was declaratory, and intended to clarify the Act and remove the confusion of conflicting de-

cisions. It obviously relates to proceedings under the prior Act as well as to the new chapter VIII. It makes no distinction between leases with indemnity covenants and those without. The broad rule we contend for is that declared by the amendment.

ARGUMENT

Our method of approaching the questions presented will be to enumerate the grounds on which the United States Circuit Courts of Appeals for the Second and other Circuits have rejected claims of this kind; then to review the decisions of this Court on the subject, to show that those grounds have been disapproved; and, finally, to present what we consider the sound governing principles.

I.

The grounds for the decision in *In re Roth & Appel*, on authority of which the petitioners' claims were disallowed, which were the contingent nature of the claims, and the alleged impossibility of liquidating them have been removed by decisions of this court.

The court below rejected these claims on the authority of its own decision in *Re Roth & Appel*, 181 Fed. 667, rendered in 1910. That case held that Section 63(a)(4) of the Bankruptcy Act, to the effect that debts may be proved which are "(4) founded upon an open account, or upon a contract express or implied", should have read into it the requirement in Section 63(a)(1) that the debt must be a fixed liability absolutely owing and not contingent at the time of the filing of the petition. It also suggested that the covenant to pay rent is extinguished

by resumption of possession by the landlord. In that case the court suggested contingencies in the following words:

> "The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in praesenti solvendum in futuro.* On the contrary, the obligation upon the rent covenant is altogether contingent."

It also said:

> "* * * Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:
>
> (1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.
>
> (2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the land-

lord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant.

In rejecting these claims on authority of *In re Roth & Appel,* the court below was confronted with decisions of this Court rendered since *In re Roth & Appel* was decided, particularly *Maynard v. Elliott,* 283 U. S. 273. Of its former decision the court below said:

> "When the situation came before us in *Re Roth & Appel,* 181 Fed. 667, under a lease like that at bar, we disallowed the claim. The ground for our action was that section 63a(4) incorporated the phrase 'absolutely owing,' of section 63a(1) and that the claim was contingent because, upon petition filed, it was uncertain whether the lessor would re-enter at all, and again, whether if he did, there would be any loss, and, if so, how much. Our interpretation of section 63(a)(4) has now been expressly overruled in *Maynard* v. *Elliott,* 283 U. S. 273, and our decision must rest upon the ground that, though the contingency of the claim is no objection to its proof, it is practically too uncertain to be liquidated."

The lower court was right in saying that the element of contingency as a ground for the decision in *In re Roth & Appel* was removed by *Maynard* v. *Elliott, supra.* It could have added that it was removed in 1915 by *Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549. The majority of the lower court adhered to the doctrine of *In re Roth & Appel,* feeling that it was bound by the rule of *stare decisis,* notwithstanding its principal ground had been removed by the

decisions of this Court. Judge Learned Hand, who wrote the opinion, said:

> "For myself, while I recognize the force of this application of *stare decisis,* it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments."

The lower court conceded that the only ground left for rejection of the claims was that they were too uncertain to be liquidated, but this ground also had been swept away by many decisions. Moreover, as to this ground, Judge Hand said:

> "Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer, but the fluctuations are less rapid. Some chances must be taken, but that is often so."

In *William Filene's Sons Co.* v. *Weed,* 245 U. S. 597, where an equity receiver had been appointed for a corporation tenant, and the landlord's claim for damages for loss of future rental was founded on a liquidated damage clause in the lease providing that the loss should be the difference between the rental value and rent reserved, it was said that this measure was "upon a footing that was familiar and fair."

Under the English bankruptcy acts, which have made provable landlords' claims for damages for loss of future rents on the bankruptcy of the tenant, and disaffirmance by the trustee, the difference between the rent reserved and the rental value has been accepted

as an adequate method of liquidating the claim. (*Ex Parte Blake,* 11 Ch. Div. 572 [1879]; *Ex Parte Llynvi Coal and Iron Co., In re Hide,* L. R. 7 Ch. App. 28; *In re Panther Lead Co.* [1896], 1 Ch. Div. 978; *In re Carruthers,* 15 Reports 317, 2 Mansons 172 [1895].)

In all such cases the real question is not the determination of the actual future loss, which would have to be postponed to await developments, for it is the present value of the contract which a creditor may prove in insolvency proceedings, both bankruptcy and equity, just as it is the measure of the amount of damages which a plaintiff may recover in an action upon anticipatory breach of contract.

As the Court below said, in *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed. 721 (a case which this Court cited with approval in the *Chicago Auditorium* case), holding that the damages suffered because of the insolvent's default on a forward contract were susceptible of present ascertainment:

> "The facts stand out for themselves. It is manifest that the Metropolitan Express Company met a serious loss . . . The Metropolitan Railway Company and its lessee, the City Company, became insolvent and their railroads went into the hands of receivers. The result was that the Express Company, without any fault on its part or on the part of its assignee, lost the benefit of this contract" (at pp. 742-743).
>
> ". . . Manifestly the claimant was entitled to recover the value of its contract" (p. 745).

The contract in question had thirteen years to run at the time of termination and it appears from the opinion that the profits under it had fluctuated widely during the term of its existence.

In *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734, the Court below in discussing the amount provable in an equity receivership proceeding by a claimant deprived of an advantageous forward contract by the insolvency of the defendant said:

> "The law seeks to give to the injured person the value of the contract of which he has been deprived, no more and no less, and the question here is: What was that contract right worth on October 30, 1920? (the date of the appointment of Receivers) And the answer is that such sum is to be determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods not for immediate delivery but for delivery at the time and place specified in the contract."

The rule is analogous to the method of ascertaining damages in anticipatory breach of contract actions, stated by this Court in *Roehm* v. *Horst,* 178 U. S. 1, 21:

> ". . . he (a contractor injured by anticipatory breach) may show what was the value of the contract by showing for what price he could have made subcontracts . . .
>
> In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."

The formula using the difference between the rent reserved and rental value as a reasonably definite way of ascertaining the damage in liquidating the claim has been stated in no more clear and simple language than in *Kalkhoff* v. *Nelson,* 60 Minn. 284, in which case

a tenant corporation had gone into receivership in dissolution proceedings, and the claim of its landlord for damages for loss of future rents was allowed. The court said:

> "It is clear that the corporation must be held liable in damages for this total breach of its executory contract to pay the rent reserved in the lease for the full term. It is true, the damages are unliquidated and that it cannot be shown with absolute certainty that the appellants, except for the breach of the contract by the corporation, would have completely executed the contract on their part so as to become entitled to its full benefits; but the same difficulties are presented in a greater or less degree in all actions for the recovery of damages for the breach of executory contracts. Any difficulties, real or supposed, in ascertaining the damages in this case, cannot defeat the action."

(See, also, *Oldfield* v. *Angeles' Brewing Co.*, 62 Wash. 260; *Clarkson* v. *Skidmore*, 46 N. Y. 297; *McGraw* v. *Union Trust Co.*, 135 Mich. 609.)

The same value, that is, the difference between rental value and rent reserved, is placed upon a loss indemnity clause. In the *Filene* case this Court cited as an authority among others for the proposition that that formula "liquidated the damages upon a footing familiar and fair" the case of *Reading Iron Works—Sweatman's Appeal*, 150 Pa. St. 369, involving the claim of a landlord, for damages in an insolvency proceeding founded upon a covenant of indemnity against loss, where the Court said (p. 375):

> "The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated . . . It is for the loss he suffers by reason of the

difference of the rentals now obtainable . . . and the rental agreed upon . . ."

The court below has itself destroyed the argument that the difficulty in liquidating the claim is a reason for rejecting the claim. In *Re Mullings Clothing Co.*, 238 Fed. 58 (certiorari denied, 243 U. S. 635), where there was an anticipatory breach of an executory contract for a lease by the prospective tenant, who thereafter went into bankruptcy, the court held that there was a provable claim on a contract under Section 63(a)(4) of the Bankruptcy Act.

The difficulty in ascertaining the damages for breach by a prospective tenant of his contract to enter into a lease is no less than in liquidating the value of the lease after it is made. In either case, damages must be measured by the difference between rental value and the rent contracted for.

Of the decisions below, it may, therefore, be said that the court itself admitted that the principal ground for its former decision disallowing such claims had been obliterated by decisions of this Court. We think the other ground it clung to—the difficulty of ascertaining the damage—has not only been obliterated by decisions of this Court and other courts, but by the lower court itself. Nothing is left of the doctrine of *Re Roth & Appel.* The lower court should not have stood on the doctrine of *stare decisis,* when the principles of its former decisions had been disapproved by this Court.

II.

Decisions in other Circuits.

The decisions in other Circuits show confusion and conflict. The court below said that "the doctrine

of *Roth & Appel* is the law in five other circuits, the First, Fifth, Sixth, Eighth and Ninth", and that "the rule in the Third and Seventh Circuits is otherwise". The leading cases in the various Circuits are as follows:

FIRST CIRCUIT—

McDonnell v. *Woods,* 298 Fed. 434;
Slocum v. *Soliday,* 183 Fed. 410.

SECOND CIRCUIT—

In re Roth & Appel, 181 Fed. 667;
Re Mullings Clothing Co., 238 Fed. 58 (C. D. 243 U. S. 635);
Re Marshall's Garage, 63 Fed. (2nd) 759;
Manhattan Properties, Inc. v. *Irving Trust Co.,* 66 Fed. (2nd) 470;
Brown v. *Irving Trust Co.,* 66 Fed. (2nd) 473.

See:

Kottler v. *New York Bargain House Inc.,* 242 N. Y. 28, decided on the basis of *Roth & Appel.*

THIRD CIRCUIT—

In re Keith-Gara Co. (D. C.), 203 Fed. 585;
In re Keith-Gara Co. (C. C. A.), 213 Fed. 450;
In re Orne, 12 Fed. 779 (D. C. 1882);
South Side Trust Co. v. *Watson,* 200 Fed. 50;
Rosenblum v. *Uber,* 256 Fed. 584;
Electric Appliance v. *Ellis,* 4 Fed. (2nd) 108;

In re Schechter, 39 Fed. (2nd) 18;
In re Caloris Mfg. Co., 179 Fed. 722 (1910).

FIFTH CIRCUIT—

Trust Co. of Georgia v. *Whitehall Holding Co.,* 53 Fed. (2nd) 635;
Atkins v. *Wilcox,* 105 Fed. 595;
Lontas v. *Coppard,* 246 Fed. 803;
Lerner Stores Corp. v. *Electric Maid Bake Shops,* 24 Fed. (2nd) 780;
Orr v. *Neilly* (Nov. 7, 1933, C. C. A. 5th).

SIXTH CIRCUIT—

Wells v. *Twenty-First St. Realty Co.,* 12 Fed. (2nd) 237;
Lamson Consol. Store Service Co. v. *Bowland,* 114 Fed. 639;
In re Miller Bros. Grocery Co., 219 Fed. 851;
Schneider v. *Springmann,* 25 Fed. (2nd) 255.

SEVENTH CIRCUIT—

In re Desnoyers Shoe Co., 227 Fed. 401 (C. D. 239 U. S. 649);
In re Chakos, 24 Fed. (2nd) 482;
In re National Credit Clothing Co., 66 Fed. (2nd) 371.

EIGHTH CIRCUIT—

Watson v. *Merrill,* 136 Fed. 359;
Britton v. *Western Iowa Co.,* 9 Fed. (2nd) 488.

NINTH CIRCUIT—

Colman Co. v. *Withoft,* 195 Fed. 250.

We have not found decisions of the Circuit Court of Appeals on this subject in the Fourth or Tenth Circuit.

It is beyond the reasonable limits of this brief here to analyze all these decisions. Their general tenor may be summarized. In the six circuits, including the Second, which hold the landlords' claim for damages for loss of future rent not provable in bankruptcy, the grounds variously assigned are:

(1) That the claim is subject to contingencies and must be rejected because the provision in Section 63(a)(1), that to be provable the debt must be a fixed liability absolutely owing at the time of the petition, is to be read into Section 63(a)(4) allowing claims on contracts express or implied.

(2) That because of the contingencies involved the amount of damage is not reasonably susceptible of ascertainment.

(3) That rent is a consideration for the use of the land and that if the landlord resumes possession under any conditions, it extinguishes the covenant to pay rent.

Many of the cases deal with leases containing indemnity covenants under which the landlord, in case of default, has a right to re-enter and relet, in which case the tenant covenants to indemnify him against loss. Such covenants are personal covenants to indemnify and not covenants to pay rent, and, therefore,

not extinguished by re-entry. The *ipso facto* covenant is one to the effect that simultaneously with the filing of the petition in bankruptcy, the lease shall automatically terminate and the tenant be bound to pay the landlord's loss represented by the difference between rent reserved and rental value for the remainder of the term. This clause was designed to remove the element of contingency, to make the claim absolute with the filing of the petition and to substitute the personal covenant of indemnity for the covenant to pay rent.

A contingency often mentioned is that the trustee may affirm the lease, but that is present in the case of any executory contract. *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581.

An examination of these decisions justifies the statement of Judge Hough (*Roth & Appel* [D. C.] 174 Fed. 64) that the whole subject has been left by the lower courts in "hopeless confusion". No consistent rule has been developed by the lower courts.

In *Re Caloris Mfg. Co.* (D. C.), 179 Fed. 722, the court, after holding such a claim provable, said:

> "I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion' and that an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey."

Most of the leading decisions of the lower courts were rendered before the decisions of this Court, hereafter referred to.

III.

The correct rule is to be found in the Bankruptcy Act and in the decisions of this court.

The question is one of interpretation of the statute.

Congress admittedly has power in establishing a uniform bankruptcy system to make a landlord's claim against his bankrupt tenant for damages for loss of future rent a provable claim, and to provide for the discharge of the bankrupt from liability for future rents, regardless of whether there are or are not special covenants, such as indemnity agreements, acceleration provisions or so-called *ipso facto* clauses.

The only question here is whether it has intended that such claims shall be proved and discharged.

The claim is fairly within the words of the statute. Section 1(11) provides:

> "'Debt' shall include any debt, demand or claim provable in bankruptcy."

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts", with exceptions not here material.

Section 63 provides:

> "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied; * * *
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

A lease is a contract. That the claim is unliquidated, forms no obstacle to its allowance, and the fact that the contract is executory or its performance contingent, is no obstacle.

The lower courts have become involved in a maze of technicalities and distinctions based on ancient maxims of the law of landlord and tenant and developed by indemnity clauses, re-entry clauses, *ipso facto* clauses, acceleration clauses, liquidated damage clauses, and a variety of other covenants contained in modern leases. They have to a large extent lost sight of fundamentals and of the purposes of the Bankruptcy Act, and of the fact that Congress has power to and may have intended that such claims should be allowed, the tenant discharged from liability for future rents, and the landlord allowed to share with other creditors in the distribution of assets.

The decisions of this Court afford a sure guide to sound conclusions.

In *Williams* v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549, decided in 1915, the opinion furnishes a chart and compass for the solution of the question. In that case a surety sued his principal for indemnity, after the principal's discharge in bankruptcy, and the question was whether the surety could have proved his claim in bankruptcy and participated in the distribution of the assets. It was contended that the claim could not have been proved, because at the date of filing the petition the principal had not yet been called upon to indemnify his surety, as the surety had not yet responded on the bond, and therefore the claim was contingent and not absolutely owing, although on a contract express or implied described in Section 63(a)(4). The court said:

> "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash

> for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortune. (Citing cases.) And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent."

After quoting the provisions of the statute we have mentioned above, the court continued:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation."

In *Central Trust Co. of Illinois* v. *Chicago Auditorium Association,* 240 U. S. 581, arising in a bankruptcy proceeding, it appeared that the Scott Transfer Company was adjudged a bankrupt on a petition filed July 22, 1911. On February 1st of that year the Chicago Auditorium Association had made a contract with the Transfer Company for a term of five years, giving the Transfer Company the baggage and livery privilege of the Auditorium Hotel, for which the Transfer Company agreed to pay stated sums in monthly instalments during the term of the arrangement. The contract contained two special provisions. In one, the Auditorium Association reserved the right to terminate the contract on six months' notice at its election, if the service was not, in its opinion, satisfactory, or if there was a change in the management of the hotel, and in case of exercise of that privilege, it was provided that both parties should be released from further liability and the concession cancelled. Another provision authorized the Association, in the

event of default by the Transfer Company, to terminate the privilege without releasing the Transfer Company from liability, in which case the latter would remain liable for the full amount of the monthly sums stipulated to be paid by it. At the time of the bankruptcy the contract had four and one-half years to run. The trustee disaffirmed the contract. The Association did not insist on the contract penalty but filed a claim for damages based on the difference between the future contract payments and the amount for which it had relet the privilege to another. After referring to the doctrine of anticipatory breach of contracts, the court said:

> "There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. * * * The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. * * * It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors."
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> * * * * * * *
>
> "In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy pro-

ceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst, supra.*

The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of §63a-4, and the damages may be liquidated under §63b."

The court then went on to consider the action of the lower court in denying damages, except such as accrued within six months after the filing of the petition, based upon the ground that the contract reserved to the Association the option to revoke it on six months' notice, and said:

> "The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges."

It held that there was no presumption that the Association would have cancelled the contract, and held that the claim was provable for the damages for the full remaining period of the contract.

William Filene's Sons Co. v. *Weed,* 245 U. S. 597, involved the provability of a claim in an equity receivership. The insolvent was a tenant under a lease, the term of which had some years to run. The receiver elected not to assume the lease, and the landlord re-entered pursuant to leave granted by the court. The lease contained a provision that upon its termination for default, the lessee would pay to the lessor as damages the difference between the rental value and the rent reserved for the residue of the term. The court held that the claim was allowable in the equity receivership. It pointed out that the case did not involve the interpretation of the bankruptcy law, saying:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation, under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept."

This statement was in answer to a contention that such a claim was not a provable claim in bankruptcy, because the court said:

> "The Circuit Court of Appeals seems to have considered also that the filing of the bill

had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date."

The respondents may take some comfort from that statement, but it was an assumption and not a decision of a question before the court.

To avoid the contention that the re-entry cancelled the obligation to pay rent under ancient common-law rules, the court said:

> "The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair."

In *Gardiner* v. *William S. Butler & Co.,* 245 U. S. 603, argued and decided on the same day as the *Filene* case, and arising out of the same receivership proceedings, another landlord made a claim for damages for loss of future rents. In the part of the opinion relating to a lease which did not contain an indemnity covenant, the court said:

> "In substance it is for damages similar to those held allowable under the former lease, but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his reentry, the lease not containing any clause stipulating for such an allowance. Of course there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition and we believe that it is the general under-

> standing in that State that in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee."

That part of the *Gardiner* case dealing with the second lease is authority for the proposition that in an equity receivership where the lease contains merely a re-entry clause and not an indemnity clause, the landlord's claim for damages for loss of future rents will not be allowed. This decision does not settle the question in bankruptcy proceedings. Whatever the rule may be in equity receiverships, the operation of the Bankruptcy Act presents a different question. As the court pointed out in the *Filene* case:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe."

Congress has power to provide a different rule in bankruptcy. It may, as a matter of policy, for a proper administration of the bankruptcy system, provide that all obligations of the bankrupt on leases entered into before bankruptcy, shall be discharged in bankruptcy, and that the landlord, to the extent of the damage he suffers, may share in the distribution of assets.

Next comes the case of *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224 (1930). There the tenant had become bankrupt and the landlord filed a claim for the full amount of the future rents. The lease contained a clause, providing that the filing of any petition in bankruptcy by or against the lessee

> "shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and with-

> out entry or other action by the lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease the lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof."

The landlord made no claim for damages measured by the difference between the rent reserved and the rental value. He planted himself on the stipulation for liquidated damages. The court refused to enforce the covenant, on the ground that the clause in the lease imposed a penalty and that the stipulation for payment of the entire reserved rent, without any diminution for rental value or probable rentals from new tenants was unenforceable, saying:

> "But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—'to treat the sum named as estimated and ascertained damages.'"

In that case, if the contention of the respondents here is sound, the court might have rejected the claim on the broad ground that a landlord's claim for damages for loss of future rentals was not a provable claim in bankruptcy. It is significant that the court confined itself to deciding the exact point presented, and based its decision on the ground that the claimant asked only for the enforcement of the penalty clause.

Next comes *Maynard* v. *Elliott*, 283 U. S. 273, arising under the Bankruptcy Act. In that case the

court allowed a claim where the claimant was the holder of promissory notes, and the bankrupt was an endorser, the notes not having matured at the time of filing the petition in bankruptcy and one of them not having matured within the time to file claims. The court below had held that the liability upon the endorsement was "not a provable claim because contingent." After quoting from the Bankruptcy Act, the court said:

> "Although the omission of any reference to contingent claims in §63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or *susceptible of liquidation,* may be proved under subdivision (a)(4) of that section, although not absolutely owing when the petition is filed. *Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581." (Italics ours.)

The court further said:

> "The obligation of an endorser is at least a 'claim,' and hence a debt so far as defined by §1(11); and the language of §63, which permits proof of a claim 'founded * * * upon a contract, express or implied,' is broad enough to embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication."

In answer to the contention that the provision in Section 63(a)(1) that the debt must be absolutely owing at the time of the filing of the petition should be read into Section 63(a)(4), the court said:

> "Respondent argues that (a)(4) must be so

> read, since, otherwise, the limitation in (a)(1) would be practically without effect. See *In re Roth & Appel,* 181 Fed. 667; *In re Hutchcraft,* 247 Fed. 187. But this contention was rejected by the decision in *Williams* v. *U. S. Fidelity Co., supra.*"

The court further said:

> "Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the Act 'to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' *Williams* v. *U. S. Fidelity Co., supra,* p. 554; *Central Trust Co.* v. *Chicago Auditorium, supra,* p. 591."

Thus, the court definitely rejected the arguments that contingent claims could not be proved under Section 63(a)(4), and expressly disapproved the rule to that effect previously announced in *Re Roth & Appel,* 181 Fed. 667. It also pointed out that the rule in *Re Roth & Appel* had been previously rejected by this Court as far back as 1915 in *Williams* v. *U. S. Fidelity Co., supra.*

It left only the qualification that the contingency of the bankrupt's obligation "may be one beyond the control of the creditor and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach" and "the contingency may be such as to make any valuation of the claim impossible". The manner of the reference to *Atkins* v. *Wilcox, supra,* is not such as to constitute an approval of that decision.

IV.

The principles announced in the decisions of this court lead to the conclusion that on bankruptcy of the tenant, the landlord's claim for damages for loss of future rent is provable in and discharged by bankruptcy proceedings.

The principles laid down in *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, lead inevitably to this conclusion and have not been modified, but have been reiterated by later decisions. The court there said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation."

It laid emphasis on the proposition that the purpose of the Act was to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." To deny provability of such claims defeats the purposes of the Act. It leaves the bankrupt liable indefinitely for the future on obligations for payment of rent incurred before bankruptcy. It leaves it optional with the landlord to continue to hold the bankrupt on his covenant to pay rent.

On the other hand, it denies to the landlord the right to participate with other contract creditors who have suffered loss through the bankruptcy in the distribution of assets. The bankruptcy strips the tenant of assets and disables him for all practical purposes from performance. If the rental value for the balance of the term is less than the reserved rent, the

landlord, as the result of bankruptcy, suffers as definite a loss as any other claimant whose claim is based on an executory contract involving future performance.

If the tenant, as in the cases at bar, be a corporation, the result to the landlord of denying provability is more harsh. True, the bankrupt corporation may remain liable under the lease, notwithstanding the bankruptcy proceedings, but unlike an individual, a bankrupt corporation rarely is rehabilitated and if the claim is not allowed in bankruptcy, the landlord is left to pursue the empty husk of a bankrupt corporation without assets and is denied participation in the distribution of the bankrupt's property. For all practical purposes the landlord's claim is discharged. It is true the landlord may resume possession of the land, but the value of what he resumes is depreciated below the rent contracted, otherwise he would have no claim. He suffers as definite a loss as any creditor. Under such a system a corporation with sufficient assets to pay one hundred cents on the dollar to all other classes of creditors, may, for the purpose of escaping liability on leases, file a voluntary petition in bankruptcy. The persons interested in the corporation may organize a new one to take over the assets at bankruptcy sale at a price which will satisfy other creditors or pay them in full, and then continue the business and leave the landlord to pursue a defunct corporation, with only the possibility of mitigating his loss by re-renting the property for less than the original lease provided. How this system works is well stated in an article on "Rent Claims in Bankruptcy," 33 *Columbia Law Review* 213 (February, 1933) as follows:

"The three years of deflation last past have

witnessed a drastic decrease in rentals and incomes. Leases made in boom days, whether for residence or business, have become major economic burdens. Numerous individuals have turned to bankruptcy, popularly conceived as a cure for all honest debts and liabilities, to find that the courts have construed the Bankruptcy Act as not releasing debtors from leasehold obligations: the insolvent individual lessee remains liable on his lease after bankruptcy, as overburdened as before. Moreover the many chain store bankruptcies engineered more or less openly for the purpose of escaping from burdensome leases without compensating the landlords, have awakened interest in the status of claims in bankruptcy for rent accruing after the filing of the petition. It is, of course, not unnatural for landlords to find little comfort in their theoretically undischarged rights against defunct corporations when they are excluded from sharing in the assets."

To the same effect see 7 *University of Cincinnati Law* Review 162.

V.

There is no practical or sound reason consistent with the purposes of the Bankruptcy Act why any distinction should be made between the claim of a landlord for damages for loss of future rents and claims founded on other types of executory contracts.

Claims have been allowed on instalment contracts to buy ice (*In re Stern,* 116 Fed. [C. C. A. 2nd] 604); contracts to buy cotton bagging (*Lesser.* v. *Gray,* 236 U. S. 70); instalment contracts to sell rubber (*In re Portage Rubber Co.,* 296 Fed. [C. C. A. 6th] 289);

contracts to buy stock (*In re Pettingill & Co.*, 137 Fed. 143); employment contracts (*Re Schultz & Guthrie*, 235 Fed. 907); annuities (*Cobb* v. *Overman*, 109 Fed. [C. C. A. 4th] 65); and on contracts to make monthly payments similar to rents for the privilege of handling baggage at a hotel (*Central Trust Co. of Illinois* v. *Chicago Auditorium Association*, 240 U. S. 581).

Whatever distinctions there may be technically between realty and personalty, and between rents and other obligations, they have no significance in bankruptcy proceedings.

VI.

There should be no distinction between leases having special indemnity or *ipso facto* covenants and those which have not.

In the cases at bar the leases contain indemnity covenants. It may not be necessary for the Court in these cases to say more than that claims on leases with such covenants are provable. Indeed, it may be to the advantage of these petitioners to have the rule so limited and exclude from participation in the distribution of assets landlords under leases without such covenants, of which no doubt there are many. We contend that at least the claims are provable under the leases disclosed in this record (See Point VII). We feel bound, however, to present the broad view of the law as we see it and are convinced that, for the purposes of the Bankruptcy Act, no such distinction should be made, and that in all cases of bankrupt tenants, bankruptcy should be treated as precipitating a liquidation of the contract, resulting in a discharge of the bankrupt from future liability and the participation by the landlord in the

distribution of assets to the extent of the damage wrought by the disablement of the bankrupt to perform, regardless of whether the lease has an indemnity, acceleration or *ipso facto* clause, or whether it contains merely the old-fashioned re-entry provision.

We have pointed out that the lower courts disallowing these claims have done so on the grounds (1) that they are contingent and not absolutely owing at the time of the filing of the petition, or (2) that the damages of the landlord are too uncertain and not susceptible of liquidation, or (3) that proving a claim for damages implies a resumption of possession by the landlord, and under the ancient law of landlord and tenant a re-entry extinguishes the covenant to pay rent.

The special covenants referred to have been relied on to remove the element of contingency, to endeavor to make claims absolute at the time of the filing of the petition, and also to avoid the objection that a covenant to pay rent is extinguished by the landlord's resumption of possession. On the latter theory, these special covenants have been said to substitute for the covenant to pay rent a personal covenant of indemnity, the liability to perform which is not extinguished as is the rent obligation by re-entry. There is support for this theory in *Gardiner* v. *Butler,* 245 U. S. 603, and in other decisions.

The Bankruptcy Act may be applied, in the way we suggest, without overturning the established technical rules of the law of landlord and tenant.

If the purpose of the Bankruptcy Act is to start the bankrupt afresh and extinguish all obligations on contracts, executory or otherwise, entered into by the bankrupt, that purpose is defeated by holding nonprovable and non-dischargeable a claim for damages for loss of future rent under *any* lease.

If another purpose of the act is to allow contract creditors of the bankrupt to participate in the distribution of assets to the extent of their losses resulting from the bankruptcy, that purpose is defeated by excluding claims for damages for loss of future rents under any form of lease.

One of the cases disallowing such claims on the theory that resumption of possession extinguished the liability for rent, is *Watson* v. *Merrill,* 136 Fed. Rep. 359 (C. C. A. 8th). In that decision it was also said that the claim would have been disallowed, even if there had been a special indemnity covenant, because the claim would have been contingent, but that statement was *obiter* although since followed in that circuit.

One fallacy in the argument that the claim of the landlord is not provable where the lease contains no special covenants of indemnity rests on the assumption that the resumption of possession by the landlord in case of the bankruptcy of the tenant is the voluntary act of the landlord, and overlooks the fact that resumption is forced upon him by the bankruptcy which strips the tenant of his assets and ability to perform and compels the landlord to resume possession to diminish his loss. It draws an artificial and wholly impractical distinction between leases and other executory contracts. If a bankrupt has previously made a contract by which he agrees to take and pay for goods to be delivered in the future, performance of his promise to pay is conditioned on the delivery of the merchandise, which, in case of his bankruptcy, never will be delivered. *For the purposes of the Bankruptcy Act,* the argument that the obligation to pay rent no longer forms a basis for awarding damage because the consideration for rent is the possession of the

land, is no more forcible than the argument that the obligation of the bankrupt to pay for the goods on future delivery is extinguished because the goods will not be delivered to an insolvent purchaser, unable to pay. It will be pointed out below (Point IX of this brief) that, under the English bankruptcy system, for more than half a century, in cases of bankruptcy of tenants, claims of landlords for damages for loss of future rents have been allowed without regard to the presence or absence of special indemnity or *ipso facto* clauses and without regard to the old common law rule that re-entry extinguishes the covenant to pay rent, and in the English cases damages have been liquidated by ascertaining the difference between the rent reserved for the balance of the term and the rental value.

We submit that the application of the principles laid down in *Williams* v. *United States Fidelity Co.*, 236 U. S. 549, leads inevitably to the conclusion that the proper interpretation of the Bankruptcy Act requires the allowance of these claims regardless of the presence of special covenants.

With contingency not an objection to allowance, and with the claim susceptible of liquidation under established rules, the only point left in respect of which special covenants of indemnity could be material is the doctrine that rent issues out of the land.

This point is that rent is the consideration for possession, and when possession is resumed by the landlord, the covenant to pay rent is terminated, and as the allowance of a claim for damages for loss of future rents necessarily involves resumption of possession by the landlord, the only covenant on which a claim could be based is cancelled, unless there is an

indemnity covenant substituted for the covenant to pay rent. This argument ignores the fundamental purpose of the Bankruptcy Act as announced in *Williams* v. *U. S. Fidelity Co.*, and *Maynard* v. *Elliott, supra,* which is to absolve the bankrupt from all obligations and to allow those who have subsisting contracts with him to participate in the distribution of his assets to the extent of their loss.

The point is acutely presented by comparison of the result in *Central Trust Co. of Illinois* v. *Chicago Auditorium Association, supra,* with the situation in this case. The Hotel Association had granted to the Transfer Company for a period of years the exclusive privilege of handling guest baggage, and a license to go upon the premises for that purpose, for which the grantee agreed to pay stipulated amounts monthly, similar to rents. In that case the enjoyment of the privilege was the consideration for the stipulated monthly payments. When on bankruptcy of the Transfer Company the right and privilege were terminated and resumed by the Hotel Company, the monthly payments by the licensee conditioned on the enjoyment of the privilege stopped just as under a lease of realty, resumption of possession by the landlord deprives the tenant of the consideration of the rent.

For any purpose germane to the bankruptcy system, what reason is there for allowing the hotel's claim for damages in that case, measured by the difference between the stipulated payments and the amount for which the privilege could be let to some other person for the balance of the contract period, and disallowing an analogous claim on a lease of realty?

The question narrows down to the contention that in the application of the bankruptcy law a distinction must be made between a claim for damages for loss of future rents under a lease of personalty and one for loss of future rents under a lease of realty.

If a landlord's claim is rejected because the lease contains no indemnity clause, he has the option to pursue the bankrupt indefinitely. No other tenants may be available. The landlord may elect not to reenter. On our theory, the landlord has no option. The future liability of the tenant is extinguished by the discharge in bankruptcy.

With due respect for Lord Coke's quaintly spelled maxim and for the ancient law, we submit that in the application of the Bankruptcy Act such a distinction has no place. It is highly technical. There is no practical difference between the two cases so far as the purposes of the bankruptcy system are concerned. The Act itself makes no exception of contracts for lease of realty and its purposes are defeated if the claim is not provable and, therefore, not discharged, and if the landlord may pursue the bankrupt after discharge. The distinction loses sight of the fact that it is competent for the Congress, notwithstanding the technical law of landlord and tenant, to absolve every bankrupt tenant from his liabilities, and to allow the landlord a provable claim for his loss. As pointed out in Point IX of this brief, England, the place of origin of our law of landlord and tenant, long ago did that very thing.

VII.

On the narrower view as to the operation of the Bankruptcy Act, the claims involved in these cases are provable because of the special indemnity covenants.

In contending that a proper construction of the Bankruptcy Act makes these claims provable regardless of the presence of special covenants, we have not intended to ask the Court to go beyond the record and decide questions not presented. Our theory is that in clearing up the "hopeless confusion" resulting from decisions of lower Federal courts, this Court will find it desirable to consider fundamentals and announce principles which will inevitably result in the allowance of these claims and make it unnecessary to consider the special covenants.

The question as to the provability of such claims in the absence of special indemnity covenants is presented in many pending bankruptcy proceedings. If not now presented in cases already docketed in this Court, it soon will be, unless this Court announces principles in these cases broad enough to dispose of the whole subject.

Nevertheless, if the Court concludes that the presence of an indemnity clause, with provision for personal liability of the tenant surviving re-entry, is necessary to make such claims provable, the claims in the cases at bar should be allowed. In both leases here involved the parties expressly contracted for personal liability of the tenant to indemnify the landlord for loss of rent consequent upon default or bankruptcy leading to re-entry, and stipulated that resumption of possession of the leased premises by the landlord would not discharge that liability.

Liability on such covenants does not cease upon re-entry, nor does the consideration for it depend upon possession of the premises. It has always been competent for the parties to a lease to contract that re-entry for default shall not release the tenant from liability to make good the landlord's loss. If the Court should reject our broader contentions and apply in bankruptcy proceedings the same rule it has applied in equity receiverships, these claims are provable (*William Filene's Sons Co.* v. *Weed, supra*).

The lease in No. 506 contains an indemnity clause in substantially the form involved in the *Filene* case, except that in the latter case the lease contained a liquidated damage clause adopting the formula which is the ordinary rule for computing the damage, and which is the rule which may be adopted even where some other rule has been contracted for (*Central Trust Co.* v. *Chicago Auditorium, supra; Reading Iron Works, supra*).

The lease in No. 505 contains an indemnity clause in which the tenant agreed to reimburse the landlord from month to month. In so far as such a covenant contemplates a continued liability of the tenant after discharge in bankruptcy, it could not be operative, but nevertheless the covenants of that lease sufficiently reserve a claim against the tenant notwithstanding re-entry.

Although the covenants in both leases provide the same formula in case of bankruptcy as is provided in case of default without bankruptcy, if the provision for future liability of the tenant after bankruptcy is discarded, there still remains the covenant for indemnity in case of default, which satisfies the rule in the *Filene* case. The result is that in both cases the covenant for indemnity may form the basis of the

claim as a substitute for the covenant for rent, and the objection that has sometimes been offered to the provability of such claims, that a rent covenant is extinguished by re-entry, disappears from the case.

If a lease contains, as do these, a personal covenant, surviving re-entry, to indemnify the landlord against loss, we see no ground for distinction between a case where there is a valid liquidated damage clause, such as the *Filene* case, especially where the liquidated damage clause adopts the standard legal rule and one where the ascertainment of the loss is left to the ordinary rules of law.

The argument advanced by the respondents below that one of these covenants provides for ascertainment of the loss in the future, overlooks the rule in bankruptcy proceedings that the present value of such contracts may be liquidated and proved, and that unless claims thereon are provable and are discharged in bankruptcy, one purpose of the Act, which is to start the bankrupt afresh, will be defeated. The argument of the respondents also overlooks the proposition that the question in bankruptcy is the ascertainability of the present value of the contract, and not the determination of actual loss by awaiting the event, and the same question is present in the case of all executory contracts.

In the *Brown* case, No. 506, it appears (R. 21) that an excess of arrears of rent over collections by the claimant from other occupiers of the premises, amounting to $4,404.40, was definitely ascertained before re-entry.

If the tenant's liability under such an indemnity covenant is not provable and therefore not discharged, the basic policy of the Act to give the bankrupt a fresh start in business is thus destroyed.

VIII.

Notwithstanding the rule to the contrary in some circuits there is no reason why this Court should refuse now to hold such claims provable.

(1) Whichever way the question is decided, this Court must overturn the rule applied in some circuits. The fact that there is a numerical superiority of circuits holding against allowance is a minor consideration.

(2) To decide against provability would involve reconsideration and modification of principles established by the decisions of this Court during the last nineteen years.

(3) To sustain provability would overrule no decision of this Court. At most, even if provability is established without regard to indemnity covenants, it would require the qualification of statements made *arguendo* where the point was not here for decision, such as Mr. Justice Pitney's statement in *Central Trust Co.* v. *Chicago Auditorium, supra,* at page 590, where, endeavoring to distinguish that case from claims under leases of real estate, he said:

> "Cases of the latter class are distinguishable, because of the 'diversity betweene duties which touch the realty and the meere personalty.' Co. Litt., 292, b, §513."

(4) The question has never been at rest in any circuit. Litigation on the subject has been continued, owing doubtless to the decisions of this Court.

(5) Under the bankruptcy system in England, the place of origin of our law of landlord and tenant, the technical rules in respect of rent covenants have not prevented allowance of the landlord's claim for loss of future rents.

(6) The argument that holding these claims provable would be unfair to merchandise creditors, because liability for future rents is not disclosed in financial statements is without substance. Other forward contracts, such as for purchase of goods or materials, are not so disclosed.

(7) There is no rule of property involved. The conflict in the lower courts has been one based largely on venue, and the provability of the claim, regardless of the location of the land, has generally been determined by the accidental or deliberate selection of the jurisdiction in which the bankruptcy petition is filed. The owner of a building in Nebraska may have rented one-half to each of two tenants, both of whom may have become bankrupt. If one were declared bankrupt in the third circuit, the landlord's claim on that half of the building would be provable. If the other tenant had filed a petition in bankruptcy in the eighth circuit, that claim would have been held not provable.

In No. 506, the bankrupt, United Cigar Stores Company, is a New Jersey corporation but had its principal place of business in New York. The petition was a voluntary one. Under the Bankruptcy Act, the petition could have been filed either in New Jersey, in the third circuit, where these claims have long been held provable, or in New York, in the second circuit, where the rule has been the other way. The bankrupt chose the second circuit.

IX.

Under the English system, landlords' claims for damages for loss of future rent where tenants become bankrupt have long been provable, regardless of the element of contingency or difficulty in ascertaining the loss and without regard to the presence of special covenants.

As early as 1769 an English judge, although holding not provable a landlord's claim for loss of future rents, remarked:

> "As it [bankruptcy] renders him absolutely incapable of performing the covenant, it would be a hardship upon him, if he should remain still liable to it, when he is disabled by the act of parliament from performing it." *Mayor* v. *Steward,* 4 Burr. 2439 (K. B. 1769).

Parliament and the English courts struggled with the problem in some confusion until finally, by 32 and 33 Vict. c. 71 §23 (1869), the landlord was given a provable claim. The difference between the rent reserved and the rental value was held a fair measure of the loss.

In *Ex Parte Llynvi Coal Co.,* L. R. 7 Ch. App. 28 (1871), it was said:

> "A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at £500 a year, and who is then suddenly deprived of his employment; in such a case he would be entitled to

prove for £500 a year, minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for £500 a year to be paid to him for the use of land, is entitled to claim £500 a year minus what he can get for the land from another tenant" (James, *L. J.*, at p. 32).

See, *Ex Parte Blake,* 11 Ch. Div. 572 (1879).

The English Bankruptcy Act of 1883 (46 and 47 Vict. c. 57) had broad provisions to the effect that bankruptcy precipitates the dissolution and liquidation of all contract liabilities, contingent or otherwise.

Section 37 of that act is as follows:

"(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in the bankruptcy.

(2.) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4.) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being

subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5.) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

(6.) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

(7.) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8.) 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, cer-

tain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

The provision for disclaimers by the trustee of executory contracts was as follows:

"55. (1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of re-

leasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3.) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just.

(4.) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

(5.) The court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to

any such person may be proved by him as a debt under the bankruptcy.

(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or

jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

(7.) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

See, *In re Panther Lead Co.* (1896), 1 Ch. Div. 978.

The English Bankruptcy Act of 1914 (4 and 5 Geo. V, c. 59), contains substantially the same provisions, in Sections 30 and 54.

The operation of these provisions as construed by the English courts has been to make provable and dischargeable landlords' claims for loss of future rents, notwithstanding their contingency or any difficulty in estimating the damage and without any regard to the presence of special covenants, or to any ancient theory that rent issues out of the land, or that the covenant to pay rent is extinguished by re-entry. The theory of the English law is that the bankruptcy disables the tenant from performance and if the trustee disaffirms the lease, inflicts a loss on the landlord and precipitates a liquidation of the contract. See also *Ex Parte The Leather Sellers' Co.*, 3 Morrell 126 (Q. B. D., 1886); *Ex Parte Verdi*, 3 Morrell 218 (Q. B. D., 1886); *Hardy* v. *Fothergill*, L. R. 13 App. Cas. 358 (House of Lords 1888); *In re Carruthers*, 15 Reports 317, 2 Mansons 172 (1895).

If the English have applied this system for half a century with success and fairness, notwithstanding liabilities under leases and other executory contracts may not have appeared in the bankrupt's balance sheets, we should have no hesitation for any practical reason in following it.

The English statute allows proof of all claims arising on contracts, executory or otherwise, contingent or not, so long as the claim is susceptible of being liquidated. That is precisely what was said of our law in *Williams* v. *United States Fidelity Co.*, 236 U. S. 549, where the court refused to disallow a claim because it was contingent, and said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation."

The English statute prescribing the procedure on disclaimers of executory contracts by the trustee, mentions leases.

Under the English system the landlord has a provable claim only if the trustee in bankruptcy disaffirms the lease, but that is so under the rule we contend for, as in the case of any executory contract.

X.

The amendment to the Bankruptcy Act enacted March 3, 1933 to the effect that "a claim for future rents shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act" is declaratory and intended to remove doubt as to the construction of the prior law and confirms our position.

By the Act of March 3, 1933 Congress added a new Chapter VIII to the Bankruptcy Act. It provided for bankruptcy proceedings for compositions and extensions in the case of individuals and for extensions and reorganizations in the case of railroad corporations. Section 74(a) of Chapter VIII so enacted is as follows:

> "74(a) Any person excepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by Section 18(b) of this Act, accompanied in either case, unless further time is granted, by his schedules, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer com-

plies with this section and has been filed in good faith or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor'. The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. *A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act.*" (Italics ours.)

The Court below, conceding but not deciding that this amendment was retrospective and applied to pending proceedings, held that it operated only in proceedings under Chapter VIII and not in proceedings resulting in adjudications in bankruptcy under the prior Act.

In both the present cases the records disclose not only that the petitions had been filed but that the time for proving claims had expired prior to the passage of this Act. There is no reason now to contend that

this statute, if considered as effecting a change in the law, should be held retrospective as to cases like these. The petitions for certiorari did not raise the point. [In *Michaud Realty Co.* v. *Heymann et al.*, trustees of Louis K. Liggett Company, bankrupt, No. 662 October Term 1933, the petition in bankruptcy was filed after the passage of the Act of March 3, 1933.] Indeed the absence of any provision in the amendment respecting pending cases confirms the view that the amendment was declaratory, in which event the question of its retrospective application does not arise.

We are confronted, nevertheless, with the question whether this amendment was intended as a change in the substantive law, and therefore, a legislative declaration that prior to the amendment the law was otherwise. Furthermore, if the amendment was declaratory and not intended to effect a change, its scope must be ascertained. It also shows the trend of legislation.

In *Bailey* v. *Clark*, 21 Wall. 284, the Court said:

> "After controversies had arisen as to the interpretation to be given to the statute, upon the question at issue in this case, between bankers and the government, Congress passed the act of 1872, defining the meaning of the terms 'capital employed', in the one hundred and tenth section, and enacted that they 'shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association, or firm'. This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising it would undoubtedly have so provided in terms."

In *Cope* v. *Cope*, 137 U. S. 682, at page 688, the Court said:

> "These several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones. *United States* v. *Freeman*, 3 How. 556, 564; *Stockdale* v. *Insurance Co.*, 20 Wall. 323."

In *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, the Court said at page 21:

> "As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. *Bailey* v. *Clark*, 21 Wall. 284; *United States* v. *Freeman*, 3 How. 556; *Cope* v. *Cope*, 137 U. S. 682; *Wetmore* v. *Markoe*, *post*, p. 68. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

In *Wetmore* v. *Markoe*, 196 U. S. 68, at page 76, the Court said:

> "In *Dunbar* v. *Dunbar*, 190 U. S. 340, cited *supra*, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed with a view to

> settling the law upon this subject and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both State and Federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon* v. *Schufeldt, supra,* it may be said to be merely declaratory of the true meaning and sense of the statute. *United States* v. *Freeman,* 3 How. 556; *Bailey* v. *Clark,* 21 Wall. 284, 288; *Cope* v. *Cope,* 137 U. S. 682, 688."

These considerations make it necessary to ascertain whether the statute is declaratory and also what may be its scope. That it was intended as declaratory and for the purpose of removing the confusion resulting from conflict of decisions, is reasonably clear. Congress must have had in mind the decisions below including those which held such claims provable, as well as the decisions of this Court which support that view. Under these conditions and the cases above cited the amendment should be accepted as declaratory, and as a mere change in the text, to clarify its meaning.

On the face of the statute itself is conclusive evidence that Congress was not of the opinion that under the former law such claims were not provable. The amendatory statute says:

> "The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, *whether or not such claims would otherwise constitute provable claims under this Act.*" (Italics ours.)

Congress would not have referred to them as provable or not if it intended to treat them as not provable under prior law.

Finally if this amendment was intended to effect a change in the law, rather than a mere change in the text to produce clarity, it was important that some provision be made respecting its application to pending proceedings such as one to prevent its application if the time for filing claims had expired but not if a reasonable time remained for that purpose after the passage of the Act. No such provision was made.

The amendment being declaratory and intended to remove doubt arising from conflicting decisions, it remains to determine its scope. The conclusion of the Court below that the sentence, "A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act", is limited in its operation to procedings under Chapter VIII for compositions and extensions, was not justified for the following reasons:

(1) The language of the clause is explicit and its operation cannot be limited to proceedings under Chapter VIII without disregarding its plain words.

(2) The phrase "provable debt" has a well-defined meaning in the Bankruptcy Act. It is a phrase used in Section 63 of the original Act and elsewhere. In the preceding sentence in Section 74(a) Congress used the expression "including a claim for future rent, whether or not such claims would otherwise constitute provable claims *under this Act*". (Italics ours.) The words "under this Act" show it was speaking of provable claims under the Act and not merely of provable claims under Chapter VIII. It is unreasonable to suppose that Congress used the

phrase "provable debt" in a different sense in the next sentence.

(3) Under the holding of the Court below the provision that a claim for future rent shall constitute a provable debt, at least requires that such claims shall be treated as provable debts in proceedings under Chapter VIII not only for extensions but also for compositions. It is found in the section which relates to compositions as well as extensions. The provision for liquidation under Section 63(b) is significant. Mere extension deals with obligations as they stand. Liquidation is only necessary when payment, by composition or by dividend after adjudication, is to be made. Chapter VIII provides for compositions in precisely the same terms as does the original Bankruptcy Act, and if the view of the lower Court is to be accepted and an individual institutes proceedings under Chapter VIII which lead to a composition, claims for loss of future rent would be provable and paid under the composition agreement, while if the composition is under the original provisions of the Act, the claim would not be provable and would receive no payment under the composition agreement. Congress could never have intended such a result. On the contrary we find in paragraph (m) of Section 74 of the new Chapter VIII the following:

> "In proceedings under this section except as otherwise provided therein * * * the rights and liability of creditors and of all persons with respect to the property of the debtor * * * shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered" etc.

(4) Finally, the legislative history of this Act shows our contention to be sound. The bill, which

afterwards became the Act of March 3, 1933, was HR 14359. Originally passed in the House, it reached the Senate and was considered in that body in committee of the whole on February 24, 1933 (Congressional Record, 72nd Congress, Second Session, pp. 5058, 5059). As Section 74(a) of Chapter VIII then stood, the sentence, "A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act", was not contained in it. Senator Bratton proposed that sentence, and Senator Hastings, in charge of the bill, said:

> "I inquire of the Senator from New Mexico whether that is not an amendment affecting the rents under the old law. As I stated this morning, there are so many things that various people want corrected in the old statute that I was very much afraid to get into it for fear we would get into a great deal of trouble in connection with it; and I have sought in this bill in the other sections to prevent any controversy arising under the old act. Therefore I intended that those words should apply to these particular sections."

Senator Bratton said:

> "I concur with the Senator that we should free ourselves of any contact with the old act; and I think I shall withdraw the amendment. I do not care to go into the old act. I think we should not do so."

The matter rested there until February 27, 1933, on which date the bill was about to be voted on. The following occurred (Congressional Record, p. 5278):

> "Mr. Bratton. Mr. President, let me say to the Senator from Delaware that on Saturday I offered an amendment, to come in on

page 42, line 6, and withdrew it temporarily. It was in this language:

A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this act.

Upon further consideration I think that amendment should be included in the bill, and I hope the Senator will accept it.

Mr. Hastings. Mr. President, the Senator from New Mexico will recall that the only reason I objected to it was because I was afraid it would open the door to amendments to the general bankruptcy law. If we are now in a position where we are about to vote on the bill to-night and there is no danger of our getting into controversy by trying to amend the bankruptcy law *generally,* I will accept the amendment." (Italics ours.)

It is quite evident that this amendment was objected to and withdrawn because it was thought to be an amendment to the text of prior provisions of the Bankruptcy Act. Senator Hastings feared that if he agreed to it, other such amendments would be pressed upon him. When the amendment was presented a second time on February 27th, the bill was about to be voted on. It is evident that Senator Hastings was then willing to accept the amendment, notwithstanding he considered it an amendment to the prior act, because the bill was to be voted on that night, and he thought there was no danger of getting into controversy by trying to amend the bankruptcy law "generally".

The Court below refused to give to this amendment its plain meaning because found in Chapter VIII. The fact that the amendment was inserted in Chapter VIII relating to other aspects of the bankruptcy situation instead of being explicitly enacted as

an amendment to Section 63(a), ought not to result in a refusal to give it effect. Congress often enacts important legislation by inserting it in irrelevant places. It is not restricted as are many state legislatures by constitutional provisions requiring a bill to relate only to one subject to be expressed in its title.

This amendment means what it says and was placed in this statute for the obvious purpose of clearing up a situation resulting from conflicting decisions in lower Federal courts.

The conclusion should be that the amendment was declaratory and intended to make it clear that landlords' claims are provable "under this act".

This declaratory amendment makes no distinction between claims on leases containing indemnity covenants and those which do not. It declares the intention of Congress that in any case where a tenant becomes bankrupt his liability for future rents shall be discharged and the landlord may participate in the distribution of assets to the extent of his damage. It supports our view as to the broad operation of the original act.

Reference should be made to pending legislation on this subject. On June 5, 1933 the House of Representatives passed the bill H. R. 5884. The principal purpose of this bill was to add a new section to Chapter VIII providing for corporate reorganizations. Meanwhile, question had arisen as to whether the sentence in the Act of March 3rd that a claim for future rents shall constitute a provable debt was limited in its operation to proceedings under Chapter VIII. [See, *In re Brooks Sample Furniture Co.*, U. S. Dist. Ct. Conn., 4 Fed. Supp. 858.] For the evident purpose of removing doubt on that question

and of placing the provision relating to proof of such claims in the appropriate section, the bill H. R. 5884 contains a Section 4 which amends Section 63(a), which defines provable claims, by adding the following:

> "(7) Claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, which claims shall be liquidated under Section 63(b) of this act." (The Congressional Record, Seventy-Third Congress, First Session, Vol. 77 No. 68, pp. 5111 to 5115.)

Like the Act of March 3, it makes no provision respecting pending cases, which would have been very desirable, if the amendment is more than a clarifying change in the text, nor does it distinguish between leases with indemnity clauses and those without.

The House Committee on the Judiciary in reporting this bill to the House June 2, 1933 (Report No. 194, House of Representatives, Seventy-Third Congress, First Session) said this:

> "This Section 4(a) also provides that claims for damages respecting executory contracts including future rents shall constitute a provable debt in bankruptcy proceedings and shall be liquidated under Section 63 of the Bankruptcy Act."

There is nothing in the report to suggest that the Committee thought they were changing the law. Under the head of "Changes in Existing Law" they do quote the amended Section 63(a), but it is evident that they were setting forth changes in the text of the statute as required by Rule XIII, Par. 2a, of

the Rules of the House of Representatives. If this bill is enacted (and it is now pending in the Senate) in its present form, it will leave the law just as we contend it to be. It accepts the broad view that all such landlords' claims shall be deemed provable regardless of special covenants.

CONCLUSION

The conclusion should be that these claims are provable, without regard to the presence of special indemnity covenants, or at least, because of them.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO POINT III OF RESPONDENTS' BRIEF

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THE COURT PRESS, INC.

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In answer to the argument in Point III of respondents' brief that the claims on the specific indemnity covenants contained in the leases in these

cases are not provable, we call attention to the following:

(1) The agreement of the tenant to indemnify his landlord is itself an existing contractual obligation susceptible of present valuation: An agreement of indemnity is the proper basis of a provable claim in bankruptcy. (*Williams* v. *United States Fidelity and Guaranty Company*, 236 U. S. 549; *In re Buzzini*, 183 Fed. 827, cited with approval by this Court in *Maynard* v. *Elliott*, 283 U. S. 273).

The provability of the indemnity covenant in bankruptcy may be based theoretically on the doctrine of anticipatory breach (cf. *Equitable Trust Company* v. *Western Pacific Railway Company*, 244 Fed. 485, aff'd 250 Fed. 327, cer. den. 246 U. S. 672; *In re Mullings Clothing Co.*, 238 Fed. 58, cer. den. 243 U. S. 635; *Central Trust Company* v. *Chicago Auditorium Ass'n*, 240 U. S. 581; *Re Fitz George* [1905] 1 K. B. 462); or on the broad ground that any contractual obligation susceptible of present liquidation, matured or unmatured, absolute or conditional, may be proved in bankruptcy. *Maynard* v. *Elliott; Restatement, Contracts*, Section 324. In *Equitable Trust Company* v. *Western Pacific Railway Company, supra*, present damages of over $38,000,000 were assessed in an action brought upon a contract to indemnify *seriatim* in future years. The district court's decision was substantially based upon the assumption that the demand would be provable in bankruptcy. L. Hand, *D. J.*, said, 244 Fed. 504:

> "This is obviously the result when the indemnitor becomes insolvent, and it would be a strange rule which favored a frank repudiator over an obligor overtaken by bankruptcy."

The opinion of the Circuit Court of Appeals, Hough, *C. J.*, cited two bankruptcy cases as authorities for the result, the *Chicago Auditorium* case and *Re Fitz George, supra.*

(2) It is not an objection to proof in bankruptcy that the agreement of indemnity by its terms provides for the payment of an amount or amounts not liquidated at the date of the petition. The function of the bankruptcy court is not to award *specific performance,* but to fix *present value.* The determination of the present value of such an indemnity covenant presents no difficulty—the accepted measure is the discounted difference between rental value and rent reserved. *Reading Iron Works—Sweatman's Appeal,* 150 Pa. St. 369, cited with approval by this court in *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597 (Petitioner's Main Brief, p. 15).

In Judge Learned Hand's opinion in *Equitable Trust Company* v. *Western Pacific Railway Company,* it was said (244 Fed. 504):

> "It is quite true that the creditor gets his discounted future installments now in hand, which is something other than getting the full value later, but that is a necessary concession to some present disposition of the controversy, as near a remedial approximation as the circumstances permit. It is true also that the indemnitor's obligation is changed from a series in the future to a gross sum down * * *. Damages sound in remedy and are by no means the equivalent of performance. Were it so, specific performance would be the only possible remedy, and even that not literally such."

(3) It should be noted that the respondents' characterization of the facts in *Williams* v. *United States*

Fidelity and Guaranty Company, supra, is not complete. They say that "every event necessary to determine both the fact of liability of the surety and its amount, had taken place prior to bankruptcy" (Respondents' Brief, p. 61). If this statement is meant to imply that the surety's claim for indemnity was fully liquidated at the date of bankruptcy it is not borne out by the record filed in this Court. While it is true that prior to the date of bankruptcy (Transcript, p. 23), the building work had been taken over by the obligees and completed and the excess cost had been determined, nevertheless, the amount which the surety actually had to pay and for which, therefore, it was entitled to indemnity had not yet been fixed. As it actually turned out, the surety did not have to pay the total excess cost which was proved by the obligees in the bankruptcy in the sum of $6,876.08 (Transcript, p. 23). The surety, which was not sued until after the bankruptcy, *settled* the judgment which was obtained against it by the obligees and had only to pay $5,475.36 (*ibid.*, p. 11) in satisfaction of that judgment. It also paid $896 to its attorneys for services in *defending and settling* the suit (*ibid.*, p. 22). Obviously neither of these amounts could have been predicated with certainty at the date of bankruptcy. As was said by the Court of Appeals of Georgia in that case:

> "* * * At the time the petition in bankruptcy was filed the surety had not sustained or incurred any loss or damage on account of the contractors' default * * *. No judgment fixing the amount of the contractors' liability had been obtained. The only information that the surety could have had on the subject was the claim made by the trustees of the school; and it could not know but that the contractors

might have a good defense to the claim, or some part of it; * * *."

Williams & Co. v. *United States Fidelity and Guaranty Company*, 11 Ga. App. 635, 644 (1912).

Respectfully submitted,

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FILE COPY

No. 506

Office Supreme Court,
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent.

RESPONDENT'S CONSENT TO WRIT

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October 26, 1933.

IN THE

Supreme Court of the United States

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SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent.

RESPONDENT'S CONSENT TO WRIT

To the Honorables, The Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review an affirmance by the Circuit Court of Appeals of the Second Circuit of an order expunging a claim in bankruptcy for future rent.

I

Respondent bases its consent upon the importance of the issue presented and the number of similar cases now pending in the lower Courts.

Numerous claims of this character have been made in the administration of the present estate in bankruptcy and are now pending before the lower Courts. In several recent decisions the Circuit Court of Appeals has in its opinions used expressions indicating that further review of the question must be had, if at all, in this Court or in the legislature.

Accordingly, the respondent, reserving the presentation of its argument on the merits for final hearing, consents to the granting of the petition.

This consent is premised upon the importance of the issue presented,—importance both to the present estate, and to numerous other bankrupt estates now in process of administration. It is not based upon any suggestion that the case was wrongly decided below, for the respondent is confident that both the decided cases and the principles of a wise administration of justice are against a reversal of the decisions below.

II

Respondent will argue at the hearing on the merits that the law in its present state supports the respondent's position, that there are sound reasons of policy why the law should not be changed, and that the change if there is to be one should be made by the legislature and not by the courts.

1. RESPONDENT BELIEVES THAT THE PETITIONERS' BRIEF HAS MISCONSTRUED THE DECIDED CASES AND THAT THE PRESENT RULE OF LAW IS CLEARLY AGAINST THE PETITIONERS' POSITION.

The petitioners admit, as they must, that the weight of authority of the decided cases both in the Second Circuit and the other lower Federal Courts is against them. Their contention is that the *ratio decidendi* of certain recent cases in this Court must result in a change in the rule established below.

The respondent is advised that the cases in this Court, which are relied upon by the petitioners, dealt with an entirely different subject-matter and are properly distinguishable.

The respondent is further advised that there is no true conflict between the Circuits.

The principle of law, upon which the Referee, District Court and Circuit Court of Appeals decided this case, has long been settled in the Second Circuit and in other circuits. Valuable rights running into many millions of dollars have become vested in reliance upon that rule of law.

2. LANDLORDS AND TENANTS THROUGHOUT THE COUNTRY HAVE FIXED THEIR LEGAL RELATIONS IN RELIANCE UPON THE PRESENT RULE OF LAW, WHICH THEREFORE SHOULD NOT BE CHANGED.

The doctrine that claims for future rent are not provable in bankruptcy, has been long established, and innumerable landlords have refrained from filing proofs of claim of this character.

Not merely would a change in the law be unjustly discriminatory against those landlords who have relied upon the existing law, but it would result in throwing into chaos the administration of the present estate, involving as it does many millions of dollars. In this very estate the holders of only a small fraction of the landlords' claims have filed. The great majority have evidently assumed that the law is established that such claims are not provable in bankruptcy. A change in the law would be a serious blow to them, as the six months' period for filing claims has long since expired.

Moreover, whatever may be true of *corporate* lessees, innumerable *individual* lessees who have been discharged in bankruptcy in prior cases are under the existing law required to continue the payment of their current rental obligations when due. A contrary decision at this time would deprive their landlords of their continuing rights at a time when it is too late for them to reassert what would have been their rights if their claims had been known to be provable. And it would give to discharged bankrupts, who are now paying their rental obligations regularly, a release which they have not earned.

3. THE PRESENT RULE OF LAW IS SUPPORTED BY REASONS OF POLICY AS WELL AS OF HISTORY.

Mr. Justice Holmes remarked in an important case that the law of leases has not forgotten Lord Coke. The petitioners and the *amici curiae* jump to the conclusion that the position of the respondent is supported only by antiquity.

But there are practical reasons behind the rule as well. There is a real difference between the landlord and the other classes of creditors,—a difference that may well have been realized by those responsible for establishing the existing rule. A bondholder or a merchandise creditor has at the date of bankruptcy actually provided the bankrupt with money or property. A landlord, on the other hand, has merely promised to hold certain land available to the bankrupt in the future.

The brief of the *amici curiae* overlooks these considerations and lightly assumes that the rule against provability of future rent claims is a "nation-wide scandal". Reference is made to "chain store corporations which, although solvent in many cases, have resorted to bankruptcy as a vehicle for corporate reorganization". Assuming that this charge applies to the present case, it does not follow that the corporation or its stockholders can through bankruptcy benefit at the expense of those having prior rights. If a reorganization be effected by a composition in bankruptcy, the landlords would be reinstated as full creditors of the bankrupt. There is no decision that even on a reorganization through sale the stockholders could buy back the properties and ignore the rent claims.

4. ANY CHANGE IN THE PRESENT RULE OF LAW MAY BE APPROPRIATELY LEFT TO THE LEGISLATURE.

The respondent is therefore advised that, even if this Court were of the opinion that the law *ought* to be changed, or that there *ought* to be one bankruptcy law for individuals and another for corporations, this Court may under the circumstances well leave such a decision to the Congress. Such proposed legislation as has been submitted by responsible landlords has contained provisions limiting the amount recoverable by landlords, it being recognized that the only change which could be made in the law by the courts, *i.e.* a complete change, would result in giving to landlords a disproportionately large share in any estate.

Respectfully submitted,

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October 26, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.,
Respondent.

RESPONDENT'S CONSENT TO WRIT.

To the Honorable, the Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review an affirmance by the Circuit Court of Appeals of the Second District of an order expunging a claim in bankruptcy for damages for an alleged breach of a lease of real property, located in New York City, between the bankrupt as tenant and the petitioner as landlord. It is claimed that the filing of the petition in bankruptcy and the subsequent adjudication constituted an anticipatory breach of the lease.

I.

Respondent is led to consent to the writ because of the general public interest in the question of law presented and the number of similar cases now pending in the lower courts.

This is the only claim for future rent or damages filed by a landlord in this case. The time for filing claims has long since expired. The present status of the estate is that all of the assets have been liquidated and are now in the form of cash awaiting distribution to creditors. All claims other than that of the petitioner have been allowed or otherwise finally determined.

In several recent decisions—in at least three of which, as your petitioner is advised, petitions have been or will shortly be submitted for writs of certiorari—the Circuit Court of Appeals has in its opinions used expressions indicating that a further review of this question should be had.

The respondent further bases its consent upon the fact that the decision in the accompanying *Brown* case, which case is mentioned in the petition and in the brief in support of the petition, is largely based on the opinion of the Circuit Court in the instant case. The respondent is advised that it is most unlikely that this court would deny one petition and grant the other, but that it would probably prefer to have the argument proceed on both cases at the same time.

The respondent is advised that in connection with the *Brown* case, a brief has been filed by amicus curiae, representing numerous landlords and associations of building owners. Surely this is indicative of the wide and sincere public interest in the questions now before the

court. The respondent, therefore, joins with the petitioner in the prayer that the petition may be granted and reserves for final hearing the presentation of its argument on the merits.

In consenting to the issuance of the writ, the respondent neither suggests nor concedes that the decree of the Circuit Court was erroneous. On the contrary, the respondent is of the opinion that, at the final hearing, this court will hold that the decree of the Circuit Court was in all respects correct and that the petitioner in the instant case has no provable claim.

Neither does the respondent suggest nor concede that the final decision of this court in the *Brown* case would necessarily be determinative of the provability of the claim in the instant case. The Manhattan Properties, Inc., lease contains a month to month deficit clause: while the lease in the accompanying *Brown* case contains a simple loss clause. For this reason, among others, it is and will be contended by the respondent that were this court to hold that bankruptcy constitutes an anticipatory breach, no provable claim for damages could be predicated on the terms of the Manhattan Properties, Inc., lease.

II.

Respondent will argue at the hearing on the merits that the validity of a landlord's claim in bankruptcy is to be determined in accordance with principles of local law; that the decree of the Circuit Court in this case followed precedent which is in complete harmony with the law of New York, the State where the claim arose and where the property is situated; that claims for future rent or for damages for anticipatory breach of a lease are not provable claims under the Bankruptcy Act; that there are sound reasons of policy why they should not be held provable; that even were they held generally provable, under the terms of the lease before the court, the claim of Manhattan Properties, Inc., must be rejected.

1. *There are compelling precedents of long standing constituting the great weight of authority in almost all the circuits holding against the petitioner.*

The respondent is advised that there are no true conflicts or real divergencies from the weight of authority in the circuits, and that those claimed divergencies are based primarily upon the proper application of a local principle of law. Therefore, they cannot be considered in conflict with the established general rule. The principle upon which this case was decided in the lower courts has long been settled in the Second Circuit. Landlords and tenants have dealt with each other in reliance upon that rule for over twenty years.

2. *Respondent is advised that the petitioner has misconstrued the cases decided by this court; that there is no decision of this court expressly or impliedly changing the settled rule.* Quite the contrary, this court has in

recent decisions expressed itself as adopting and ratifying the rule in the Second Circuit.

3. *The legislature has adopted the present rule of law. Therefore, a decision of this court upsetting the settled rule would contravene the intention of the legislature.*

The legislature is charged with the knowledge of the settled rule as it existed prior to March 3, 1933. The amendments of March 3, 1933, to the Bankruptcy Act provided for proof of future rent claims in extension proposals for which no provision was found in the Bankruptcy Act. Under such circumstances, where Congress did not see fit to amend the Bankruptcy Act generally, it may be regarded as having adopted the settled rule. Therefore, any change in the present rule may be left to the legislature.

WHEREFORE, the respondent respectfully prays:

1. That the prayer of the petition be granted and that a writ of certiorari issue under the seal of this court to review the decree of the Circuit Court of Appeals in the above case.

2. That upon said hearing, said decree be in all respects affirmed.

Respectfully submitted,

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October 26, 1933.

FILE COPY

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

October Term, 1933.

MANHATTAN PROPERTIES, INC., *Petitioner,* *vs.* IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *vs.* IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.	No. 506

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the United States Circuit Court of Appeals are reported in 66 Fed. (2d) 470, 473.

STATUTES INVOLVED

Section 63 of the Bankruptcy Act provides:

"*Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

"'debt' shall include any debt, demand or claim provable in bankruptcy;"

Section 17 provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts". * * * with exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stat. 562, as amended; U. S. C. A., Title 11, Sections 1, 35 and 103.)

STATEMENT

No. 506. Brown v. *Irving Trust Company.*

On August 29, 1932, United Cigar Stores Company of America, a New Jersey corporation, was adjudicated a bankrupt upon its voluntary petition in the Southern District of New York (R. 1). On June 14, 1920, certain premises located in Nebraska were leased to United Cigar Stores Company of America at a stated rental for a term of years commencing July 1, 1920, and expiring June 30, 1945 (R. 2). The petitioners, Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, are now owners of these premises subject to the lease (R. 2). The lease contained the following covenant (R. 7):

> "Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and

remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

On November 23, 1932, Irving Trust Company, Trustee in Bankruptcy, disaffirmed the lease (R. 21). Thereafter, on November 26, 1932, the petitioners re-entered upon the premises and terminated the lease (R. 21). The petitioners filed a proof of claim on January 13, 1933, which, as amended (R. 19), included an item of $4,404.40, representing the difference between the rent accrued to the date of re-entry and the collections from occupants of the premises during that period, and an item of $140,615.80 (R. 21), representing the loss alleged to have been suffered by reason of such termination for the residue of the term, computed as follows: The rent reserved in the lease was $20,000 per annum after taxes and charges. The petitioners alleged the property had a rental value for the residue of the term of $5,000 a year after taxes and charges, and claimed that their loss was $15,000 per annum from November 26, 1932 to June 30, 1945, the present value of which, discounted at 5% annually, they assert to be $140,615.80 (R. 21). On February 28, 1933, the petitioners made application for liquidation of this claim

under Section 63b of the Bankruptcy Act (R. 16). On March 8, 1933, the Trustee obtained an order to show cause why the claim should not be disallowed and the proof thereof expunged (R. 18). The Referee disallowed both items of the claim, holding that as a matter of law they were not provable, and expunged the proof thereof (R. 23-30). On petition for review, the order of the Referee was affirmed by the District Court (R. 33), and, on appeal, the judgment below was affirmed by the United States Circuit Court of Appeals.

No. 505. Manhattan Properties, Inc. v. *Irving Trust Company.*

Oliver A. Olson Co., Inc. was adjudicated a bankrupt in the Southern District of New York on March 18, 1932. On December 20, 1927, one Reid, then owner of certain real estate in New York City, leased such property to the Oliver A. Olson Co., Inc. at a stated rental for a term commencing February 1, 1928, and expiring October 1, 1937 (R. 3). In December, 1928, the property was conveyed to Manhattan Properties, Inc. subject to the lease.

Oliver A. Olson Co., Inc. defaulted in the payment of rent for February and March, 1932. Upon its adjudication in bankruptcy, Manhattan Properties, Inc. filed its claim, comprising one item of $1,558.93 (representing rent for February and March less $107.75 received from the Receiver for use and occupation), and another item for $25,000 damages for loss of future rentals, being the difference between the total unaccrued rent for the balance of the term reserved in the lease, viz., $58,000 and $33,000 which Manhattan Properties, Inc., alleged

to be the present rental value of the remainder of the term (R. 2). The lease (R. 3) provided (R. 13):

> PROVIDED ALWAYS NEVERTHELESS, that if default be made by the Tenant in the performance of any covenant herein, except the covenant for the payment of rent or additional rent, or in the covenants of any other lease between the Landlord and Tenant, the Landlord, upon the happening of any such events, may give to the Tenant five days' notice of intention to end the term of this lease or any other lease between the Landlord and Tenant, and thereupon, at the expiration of said five days, the term of this lease and any and all other leases affecting the same Landlord and Tenant shall expire as fully and completely as if that day were the date herein or therein definitely fixed for the expiration of the term, and the Tenant will then quit and surrender to the Landlord the demised premises mentioned in this or any such lease; but the Tenant shall remain liable as herein provided, except that if the demised premises be destroyed by fire or other casualty the foregoing provision shall not affect any other lease between the same Landlord and Tenant; or, if the Tenant make default in the payment of the rent reserved hereunder, or any part thereof, or in making any other payment herein provided for, or if the notice last above provided for shall have been given and said five days' period shall have elapsed, or if the Tenant abandon said premises, if said premises become vacant, if the Tenant become insolvent, if the Tenant make an assignment for the benefit of creditors, if bankruptcy proceedings be instituted by or against the Tenant, if a Receiver or Trustee of the Tenant's property be appointed, or if any similar event happen in re-

spect to any other lease between the Landlord and the Tenant, then it shall be lawful for the Landlord, or the Landlord's agent, without notice, to re-enter said premises and every part thereof, either by ejectment, summary proceedings, personal entry, or otherwise, and remove all persons and property therefrom without being liable to indictment, prosecution, or damages therefor, and in the event of such re-entry or the cessation or cancellation of such estate, lease, renewal or extension, the Tenant, for the Tenant and for all persons claiming through or under the Tenant, hereby waives any and all right to redemption now or hereafter given by any law. The Landlord may, after obtaining possession of said premises, re-let the same or any part thereof as the agent of the Tenant for the whole or any part of the term herein demised, from time to time, as the Landlord may deem best. In the event that the Landlord shall obtain possesion by re-entry, dispossess, summary proceedings or otherwise, the Tenant hereby agrees to pay to the Landlord on demand the expense incurred by the Landlord in obtaining possession of said premises, including legal expenses and attorneys' fees, and to pay such other expenses as the Landlord may incur in putting the premises in good order and condition, and also any other expense or commissions which may be paid by the Landlord in and about the letting of the same. The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord;

> the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder. The Landlord may sue for and enforce the collection by law of such amount as above provided for which may be due at the expiration of each month, and the Tenant expressly agrees that any such suit shall not be a bar to or prejudice in any way the rights of the Landlord to enforce the collection of the amount due at the end of any other future month by a like or similar proceeding. If said Tenant shall, at the date of the execution of this lease, be in possession of said premises under an existing lease, it is agreed that if the said lease under which said Tenant holds said premises shall for any cause be cancelled before its date of expiration, then this lease shall likewise, at the option of the Landlord, be void and of no effect.

The claim insofar as it related to rent accrued to the date of bankruptcy was allowed. Insofar as it related to damages for loss of future rentals, it was disallowed by the Referee in Bankruptcy (R. 17), on the ground that, as a matter of law, it did not constitute a provable claim in bankruptcy (R. 20). On petition to review, the United States District Court affirmed the order of the Referee (R. 21). The order of the District Court was affirmed on appeal to the United States Circuit Court of Appeals (R. 25).

SUMMARY OF ARGUMENT.

I.

(A) The Legislative and Judicial history of the Bankruptcy Act is persuasive, if not conclusive, that Congress did not intend that claims for damages for loss of future rent should be provable in bankruptcy.

(B) Moreover, only compelling language in the Act itself—which is wanting therefrom—would warrant the rejection of the construction placed upon the Act by the courts below, which is a construction accepted and followed with substantial unanimity by Bench and Bar practically ever since the enactment of the statute.

(1) The Legislative and Judicial background of the present Bankruptcy Act.

(2) The interpretation placed upon the Act since its passage and the subsequent action of Congress, down to the year 1933.

(3) Decisions of this Court and subsequent legislative history of the Act up to March, 1933.

(4) The foregoing review of the legislative and judicial history of Section 63a conclusively demonstrates that the long accepted interpretation thereof by Bench and Bar coincides with the intent of Congress itself.

(5) The amendment of March 3, 1933 was not, as asserted by petitioners, declaratory of the intent of the Act as originally passed.

(6) In view of the legislative and judicial history of the Act, the Court should affirm, because there is lacking in the statute itself that com-

pelling language which alone would warrant the Court in overturning an interpretation of the Act followed and accepted by Bench and Bar practically ever since its enactment.

(a) There is no compelling language in the statute requiring the overturning of the long established interpretation.

(b) As in *Maynard* v. *Elliott,* to overturn the settled practice of more than thirty years would involve serious consequences.

II.

The long accepted interpretation of the Act upon which the decisions below are based is consistent with the decisions of this Court and is supported by well established and long recognized principles of law (Answer to Points I, III, IV, V, VI of Petitioners' Brief).

III.

The specific claims presented in these cases, arising out of the particular covenants contained in the leases before the Court, are in no event provable in bankruptcy.

(1) In the *Brown* case, No. 506.

(2) In the *Manhattan Properties* case, No. 505.

(3) Even though a claim for damages under breach of a simple covenant to pay rent should be held to be provable, claims arising under the leases here in question are not provable.

ARGUMENT

I

(A) THE LEGISLATIVE AND JUDICIAL HISTORY OF THE BANKRUPTCY ACT IS PERSUASIVE, IF NOT CONCLUSIVE, THAT CONGRESS DID NOT INTEND THAT CLAIMS FOR DAMAGES FOR LOSS OF FUTURE RENT SHOULD BE PROVABLE IN BANKRUPTCY.

(B) MOREOVER, ONLY COMPELLING LANGUAGE IN THE ACT ITSELF—WHICH IS WANTING THEREFROM—WOULD WARRANT THE REJECTION OF THE CONSTRUCTION PLACED UPON THE ACT BY THE COURTS BELOW, WHICH IS A CONSTRUCTION ACCEPTED AND FOLLOWED WITH SUBSTANTIAL UNANIMITY BY BENCH AND BAR PRACTICALLY EVER SINCE THE ENACTMENT OF THE STATUTE.

Under Point II we shall endeavor to show that, contrary to the contentions of the petitioners, the construction placed upon the Act by the courts below is not inconsistent with the decisions of this Court, but is, in fact, sustained by well established principles of law recognized by this Court.

At the outset of the argument, however, it will be helpful to review briefly the legislative and judicial history of the Bankruptcy Act relating to future rent claims. Such history is a helpful guide to interpretation in any case, and particularly so in this instance. In this, as in many other cases, legislative and judicial history

are so interwoven that they may appropriately be considered together.

1. The Legislative and Judicial background of the present Bankruptcy Act.

Under the Bankruptcy Act of 1800, claims for future rent were not provable and the bankrupt's discharge did not relieve him from liability under a lease. *Hendricks* v. *Judah*, 2 Caines 25 (N. Y., 1804). The same doctrine was applied under state insolvency laws on the theory that rent to accrue was not a present debt, the court following the rule then being applied by the British courts under the British Bankruptcy Act (7 Geo. I., c. 31). *Lansing* v. *Prendergast*, 9 Johns. 127 (N. Y., 1812).

The Bankruptcy Act of 1841 made express provision for proof and allowance of "uncertain or contingent demands" against a bankrupt, although claims for future rent were not specifically mentioned.*. Notwithstanding the express provision for proof of uncertain and contingent demands and for the determination of their present value, this Court held that claims based upon contracts, in respect of which it was uncertain whether

*The Bankruptcy Act of 1841, Sec. 5, provided in respect of claims for unmatured obligations:

> "* * * all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained under the direction of such court, and allowed them accordingly, as debts in presenti * * *."

any actual liability would ever arise and if so to what extent, and such uncertainty could not be removed by calculation, were not provable. *Riggin* v. *Maguire,* 15 Wall. 549 (1872). In the state courts, it was specifically held that claims for future rent were not provable under that Act and hence not discharged, the courts refusing to assimilate claims for future rent to the various classes of claims mentioned in the Act of 1841, as being neither a present debt nor a contingent claim susceptible of present valuation. *Bosler* v. *Kuhn,* 8 Watts & S. 183 (Pa., 1844), *Stinemets* v. *Ainslie,* 4 Denio 573 (N. Y., 1847), *Savory* v. *Stocking,* 4 Cush. 607 (Mass., 1849).

The Bankruptcy Act of 1867, Sec. 19, provided:

> "* * * In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such a manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.
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> * * * * * * *
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> "* * * Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Under this Act, the courts continued to hold that claims for future rent or damages for breach of lease were not provable. Some of the cases so holding relied upon the provision permitting proof for a proportionate part of the rent up to the date of bankruptcy, holding that this impliedly prohibited proof of any rent accruing thereafter, particularly in view of the further provision in the Act that only specified debts should be proved. *In re May*, Fed. Cas. 9325 (D. C. S. D. N. Y., 1874); *In re Hufnagel*, Fed. Cas. 6837 (D. C. E. D. Mich., 1875); *Bailey* v. *Loeb*, Fed. Cas. 739 (C. C. M. D. Ala., 1875).

Others, *Ex parte Houghton*, Fed. Cas. 6725 (D. C. Mass., 1871) and *Ex parte Lake*, Fed. Cas. 7991 (D. C. Mass., 1877), disallowed such claims upon the common law principle that rent was not a debt until the rent day and did not fall within the provisions of the Act permitting proof of contingent claims. See also *In re Croney*, Fed. Cas. 3411 (D. C. S. D. N. Y., 1875); *In re Commercial Bulletin Co.*, Fed. Cas. 3060 (C. C. La., 1876). In *Ex parte Houghton, supra,* the leading case arising under this Act, the court also pointed out that at common law re-entry by the landlord terminated the lease and discharged all obligations thereunder and that damages were not thereafter recoverable for a breach of the covenant to pay rent. It was pointed out that the question whether future rent can be proved as a debt in bankruptcy must depend upon the particular language of the statute, and that the law in this respect had been changed by statute in England but not by the Federal Bankruptcy Act.

As stated in petitioner's brief (p. 46), claims for loss of future rent were not provable under the British Bank-

ruptcy Acts until expressly made so by Section 23 of the Act of 1869 (32 & 33 Vict., c. 71), which provided as follows:

"23. When any property of the bankrupt acquired by the Trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bank-

rupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

This section was incorporated and amplified in Section 55 of the British Bankruptcy Act of 1883 (46 & 47 Vict., c. 52, s. 55), set forth *in haec verba* in petitioners' brief, pages 47-52, which Act was in effect at the time the Bankruptcy Act of 1898 was passed.

No corresponding change was made in our Bankruptcy Act of 1867 although it remained in effect for eleven years and until repealed in 1878.

In 1880, Judge Lowell, then United States Circuit Judge for the First Circuit, at the request of the Board of Trade of Boston and other mercantile associations, drafted a new Bankruptcy Act which, after revision by the National Convention of the Boards of Trade and other commercial organizations held in Washington on January 19 and 20, 1881, and after amendment and modification by the Judiciary Committee of the United States Senate, was introduced in Congress (Vol. XIV Congressional Record, pp. 42-49, 399; U. S. Sen. Ed. of Lowell Bill—1883) but failed of passage. This bill contained provisions similar in effect to those of the British Act of 1869 above referred to. Sec. 60 provided specifically for proof and allowance of all damages suffered by reason of the rejection by the trustee of a lease. Sec. 61 provided that the landlord or any creditor might in writing require the trustee to elect within twenty days after such notice whether to accept or decline a lease; that failure to accept within such time should be deemed a declination, in the event of which

"the landlord may have any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy."*

*Section 60 and 61 of Judge Lowell's bill were as follows:

"Debts.

"Sec. 60. That the following debts and liabilities and no others, shall be provable in bankruptcy: All debts absolutely due by the bankrupt at the commencement of the proceedings, whether then payable or not, with any interest which would have been recoverable thereon at that date, or with a rebate of interest upon such as were not then payable, and do not bear interest by the terms of the contract; all damages suffered by reason of the rejection by the trustee of a lease, as hereinafter provided; all demands for or on account of any goods or chattels wrongly taken, converted or withheld by the bankrupt, to the amount of their value, with interest; all unliquidated damages arising out of any contract or promise, absolute or contingent, express or implied, whether the breach is before or after the bankruptcy, the amount of all such demands and damages, and of all equitable debts, to be assessed in such mode as the court shall direct; all taxable costs incurred in good faith by a creditor before the bankruptcy, in an action to recover a provable debt, may be added to the proof thereof; all costs then taxable against a plaintiff who shall become bankrupt upon a cause of action which would pass to the trustee, and which the trustee declines to prosecute after notice. If judgment is obtained upon a provable debt pending the proceedings, and before the bankrupt's discharge, the debt and costs to the time of bankruptcy may be proved, as if no judgment had been obtained. If the bankrupt shall be bound as drawer, endorser, surety, bail or guarantor upon any bill, note, bond, specialty or contract, or for the debt of another, the creditor may prove the same at any time after the liability shall become fixed, and before the final dividend shall be declared. In all cases of contingent debts, demands and liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may apply to the court, seasonably before such final order, to have the value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall direct; and he

The Report of the Committee on the Judiciary of the House of Representatives (House Rept. No. 1228, 54th Cong., 1st Session), submitting and recommending the bill which subsequently became the present Act, does not disclose the origin of the phraseology contained in Sec. 63a. Neither does it discuss the classes of debts or claims intended to be included therein or excluded therefrom. See also House Rept. No. 65, 55th Cong., 2nd Session, p. 21; Senate Doc. No. 294, 55th Cong., 2nd Session, p. 22; *Schall* v. *Camors*, 251 U. S. 239, 250-251. In reporting this bill, the Committee was fully cognizant of prior acts and of the decisions thereunder, and of Judge Lowell's bill (which is referred to in the report), and must have been familiar with the

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may prove for the amount so ascertained. If the court shall find such debt or liability incapable of valuation, a decree to that effect shall be entered upon the record.

"Debts falling due at stated periods shall be apportioned up to the time of bankruptcy, and proof be made for the proportionate part thereof.

"Leases, Rents.

"Sec. 61. That the bankrupt shall not be entitled to the benefits, nor be bound by the covenants or engagements of any lease held by him at the time of his bankruptcy, but such lease shall be deemed to be surrendered, so far as he is personally concerned. The trustee may decline the lease at any time, notwithstanding that he may have endeavored to sell the same, or have exercised acts of ownership in respect thereto: *Provided*, That the landlord or any creditor may, in writing, require him to elect, within twenty days after such notice, whether to accept or decline the same; and the failure to accept within such time shall be deemed a declination. When a lease is declined, the landlord may have any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy. Such declination shall not affect any right of the trustee to deal with fixtures belonging to the bankrupt."

British Bankruptcy Act. Moreover, the Committee Report discloses that both the subject and the text of a new bankruptcy act had been a matter of public debate by various disinterested organizations for a period of several years and that three national conventions had convened to discuss and perfect the bill which was reported, in the course of which consideration must have been given to prior acts and the decisions thereunder, to Judge Lowell's bill and to the British Act.

The Act as introduced and passed, however, made no specific provision for proof and allowance of claims for damages for loss of rent, which had been held not to be provable under previously existing acts, both American and British, and to meet which Judge Lowell's bill and the then existing British Act made specific provision. The omission must have been by design. The inference is plain that by such omission Congress intended that claims for damages for loss of rent should remain, as before, unprovable under the Act. *Schall* v. *Camors, supra.*

2. The interpretation placed upon the Act since its passage and the subsequent action of Congress, down to the year 1933.

Whether or not Congress intended by such omission that such claims should be unprovable, it was apprised by the courts almost immediately after the Act became effective that in their opinion such claims were not provable. Within two years after the passage of the Act it was held in *In re Ells,* 98 Fed. 967 (D. C. Mass.,

1900), that neither claims for damages for loss of rent nor claims arising under a contract of indemnity, similar to the contracts in these cases, were provable in bankruptcy. The rule therein stated has been subsequently followed by the Circuit Courts of Appeals for the First, Second, Fifth, Sixth, Eighth and Ninth Circuits (as impliedly conceded in petitioners' brief) and by the District Courts generally. These cases, cited in the order of their determination, are as follows: *In re Ells, supra; In re Collignon,* 4 A. B. R. 250 (D. C. N. D. N. Y., 1900); *Atkins* v. *Wilcox,* 105 Fed. 595 (C. C. A. 5th, 1900); *In re Mahler,* 105 Fed. 428 (D. C. E. D. Mich., 1900); *In re Pennewell,* 119 Fed. 139 (C. C. A. 6th, 1902); *In re Shaffer,* 124 Fed. 111 (D. C. Mass., 1903); *Watson* v. *Merrill,* 136 Fed. 359 (C. C. A. 8th, 1905); *In re Roth & Appel,* 181 Fed. 667 (C. C. A. 2d, 1910); *Slocum* v. *Soliday,* 183 Fed. 410 (C. C. A. 1st, 1910); *In re Cress-McCormick Co.,* 25 A. B. R. 464 (D. C. S. D. Miss., 1910); *In re Sterne & Levi,* 26 A. B. R. 535 (D. C. E. D. Tex., 1911); *Colman Co.* v. *Withoft,* 195 Fed. 250 (C. C. A. 9th, 1912); *In re Sterne & Levi,* 30 A. B. R. 915 (D. C. E. D. Tex., 1912); *In re Abrams,* 200 Fed. 1005 (D. C. N. D. Ia., 1913); *In re Scruggs,* 205 Fed. 673 (D. C. S. D. Ala., 1913); *In re J. Sapinsky & Sons,* 206 Fed. 523 (D. C. Ky., 1913); *In re Frischknecht,* 223 Fed. 417 (C. C. A. 2d, 1915); *In re Mullings Clothing Co.,* 238 Fed. 58 (C. C. A. 2d, 1916); *McDonnell* v. *Woods,* 298 Fed. 434 (C. C. A. 1st, 1924); *In re Cushman,* 3 Fed. (2d) 449 (D. C. S. D. N. Y., 1924); *In re S. & H. Katz,* 6 Fed. (2d) 581 (D. C. N. D. Miss., 1925); *Britton* v. *Western Iowa Co.,* 9 Fed. (2d)

488 (C. C. A. 8th, 1925); *Wells* v. *21st St. Realty Co.*, 12 Fed. (2d) 237 (C. C. A. 6th, 1926); *In re Mlle. Lemaud, Inc.*, 13 Fed. (2d) 208 (D. C. Mass., 1926), aff'd 16 Fed. (2d) 780; *In re Hook*, 25 Fed. (2d) 498 (D. C. Md., 1928); *In re Barton Co.*, 34 Fed. (2d) 517 (D. C. N. H., 1929) *In re Service Appliance Co., Inc.*, 39 Fed. (2d) 632, 45 Fed. (2d) 884 (D. C. N. D. N. Y., 1930); *In re Twentieth Century Millinery Exchange, Inc.*, 41 Fed. (2d) 237 (D. C. S. D. N. Y., 1930); *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930); *In re Goldberg*, 52 Fed. (2d) 156 (D. C. S. D. N. Y., 1931); *Trust Co. of Georgia* v. *Whitehall Holding Co.*, 53 Fed. (2d) 635 (C. C. A. 5th, 1931); *In re Blum Bros. Co.*, 55 Fed. (2d) 723 (D. C. S. D. Ohio, 1932); *In re Hubbard*, 57 Fed. (2d) 213 (D. C. W. D. N. Y., 1932); *In re Schulte-United, Inc.*, 2 Fed. Supp. 285 (D. C. S. D. N. Y., 1932); *In re Bliss Auto Sales Co.*, 22 A. B. R. (N. S.) 44 (D. C. N. D. Ohio, 1932); *In re Wise Shoes, Inc.*, 2 Fed. Supp. 521 (D. C. S. D. N. Y., 1932), aff'd 64 Fed. (2d) 1023; *In re Marshall's Garage, Inc.*, 63 Fed. (2d) 759 (C. C. A. 2d, 1933); *In re Metropolitan Chain Stores, Inc.*, 66 Fed. (2d) 482 (C. C. A. 2d, 1933); *In re United Cigar Stores Company of America*, 4 Fed. Supp. 859 (D. C. S. D. N. Y., 1933); *In re Brooks Sample Furniture Co.*, 4 Fed. Supp. 858 (D. C. Conn., 1933); *Orr* v. *Neilly*, 67 Fed. (2d) 423 (C. C. A. 5th, 1933).

We have found no decisions on the point by the Circuit Courts of Appeals of the Fourth or Tenth Circuits. In the only cases which have arisen

in the District Courts of the Fourth Circuit, however, rent claims have been held not to be provable. *Bray* v. *Cobb*, 100 Fed. 270, (D. C. N. C., 1900); *In re Hook*, *supra*. So far as the Tenth Circuit is concerned it may be safely assumed that the rule, which, as appears from the foregoing citations, is so well established in the Eighth Circuit beginning with *Watson* v. *Merrill*, *supra*, in which the opinion was written by Judge Sanborn and concurred in by Judge (now Mr. Justice) Van Devanter, is still the law in the Tenth Circuit.

The statement in petitioner's brief (p. 16) that "decisions in other Circuits show confusion and conflict" is inaccurate.*

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*Cases in the Third Circuit disclose the application in that Circuit of a somewhat different rule but one which is not in conflict. These cases are chiefly Pennsylvania cases, in which state there is a statute giving to the landlord a statutory lien for accrued rent. In cases in that Circuit where the lease contains an acceleration clause, under which all rent for the remainder of the term becomes immediately due and payable upon bankruptcy, it has been held that the effect of this clause is to accrue such rent as of the date of bankruptcy and entitle the landlord to the benefit of the statutory lien. *In re Pittsburgh Drug Co.*, 164 Fed. 482 (D. C. W. D. Pa., 1908): *In re Keith-Gara Co.*, 203 Fed. 585 (D. C. E. D. Pa., 1913), aff'd 213 Fed. 450. On the other hand it is the settled law in that Circuit that if the landlord re-enters and terminates the lease he forfeits all right to future rent and all obligation to pay rent ceases therewith, and the landlord is not entitled either to rent or damages for the remainder of the term. *Wilson* v. *Pennsylvania Trust Co.*, 114 Fed. 742 (C. C. A. 3rd, 1902); *South Side Trust Co.* v. *Watson*, 200 Fed. 50 (C. C. A. 3rd, 1912); *In re Lasket Co., Inc.*, 251 Fed. 53 (C. C. A. 3d, 1918), cert. denied 248 U. S. 562; *Rosenblum* v. *Uber*, 256 Fed. 584 (C. C. A. 3d, 1919). The theory of the rule in the Third Circuit appears to be that under the acceleration clause the rent for the entire remainder of the term becomes due and payable at the date of bankruptcy and that in return for the allowance of the landlord's claim the lease for the full remainder of the term becomes an asset of the estate to be disposed of along with other assets, free from any charge for rent

The construction therein placed upon the Act, which is the construction placed upon it by the courts below, has been accepted by leading text writers and announced by them to be the law, 2 Collier on Bankruptcy (13th ed.) p. 1422; 2 Remington on Bankruptcy (3d ed.) § 789, 793, 795, a circumstance stressed by the Court in *Maynard* v. *Elliott,* 283 U. S. 273 (1931), at p. 276.

Between the decision in *In re Ells, supra,* in 1900, and March 3, 1933, when an amendment of the Act referred to in the petitioners' brief was made (see pp. 34-43, *post*), Congress has amended the Bankruptcy Act seven times, on February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, and February 11, 1932. 47 Stat. 1467. During the intervening thirty-three years, however, no amendment was made to Sec. 63 so as to change the situation created by the substantial unanimity of opinion on the part of Bench and Bar, as disclosed above. Congress could not have been unmindful of these decisions. On the contrary, it is pre-

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during the remainder of the term, but that if the landlord, instead of invoking the acceleration clause, re-enters and terminates the lease, he is not entitled either to future rent or to damages. Whether the first part of the rule as thus announced is correct or not—a question not presented in this case—the corollary which accompanies it is in complete harmony with the rule in other Circuits that neither claims for future rent as such nor under contracts of indemnity are provable in bankruptcy.

The cases in the Seventh Circuit are in some confusion, but in *In re National Credit Clothing Company,* 66 Fed. (2d) 371 (1933), the Circuit Court of Appeals for that Circuit specifically recognized the general rule, and in *In re Rubel,* 166 Fed. 131 (D. C. E. D. Wis., 1908), it was expressly held that a claim for future rent could not be proved, even though liquidated by lease provisions.

sumed to know the interpretation placed upon its statutes by the courts. *United States* v. *Farrar,* 281 U. S. 624, 634. The inference is plain, that the decisions of the courts coincided with the intent of Congress and that Congress did not intend that claims for loss of future rent, whether arising under the covenant to pay rent itself or under a covenant of indemnity, should be provable in bankruptcy. (See I, 4, pp. 29-34, *post,* for authorities.)

3. Decisions of this Court and subsequent legislative history of the Act up to March, 1933.

In *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916), one of the cases relied on by the petitioners, the Court held that damages growing out of an anticipatory breach of a contract for personal services, which the bankrupt was disenabled to perform by reason of bankruptcy, constituted a provable claim. In so doing, this Court itself pointed out the distinction between such a case and a claim for damages arising out of the relation of landlord and tenant. After citing a number of cases relating to claims growing out of contracts relating to personalty or to performance of personal services, the Court said (p. 590):

> "* * * besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ells,* 98 Fed. Rep. 967; *In re Pennewell,* 119 Fed. Rep. 139; *Watson* v. *Merrill,* 136 Fed. Rep. 359; *In re Roth & Appel,* 181 Fed. Rep. 667; *Colman Co.* v. *Withoft,* 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the 'diversity betweene duties which

touch the realty, and the meere personalty.' Co. Litt., 292, b, § 513."

Of the cases cited in the foregoing excerpt, *In re Ells* (to which reference has previously been made) and *In re Roth & Appel* involved claims arising out of contracts of indemnity similar to those involved in the present cases. *Watson* v. *Merrill* was a case in which damages for breach of a simple covenant to pay rent were sought to be proved as a claim in bankruptcy. *In re Pennewell* involved a claim for breach of covenant of quiet enjoyment against the estate of the bankrupt by his sublessee because of the latter's eviction by the head landlord. *Colman Co.* v. *Withoft* involved a claim founded upon a bankrupt-lessee's contract to reimburse his joint lessee for half the cost of procuring a cancelation of the lease.

In varying forms, each of the cases cited in the foregoing excerpt thus related to claims growing out of the relation of landlord and tenant and of the contractual agreements entered into between them. As to each of these cases, the court declared them to be distinguishable from *Central Trust Co.* v. *Chicago Auditorium Association* upon the authority of the quotation from Lord Coke, which recognizes a fundamental distinction in the law between the rights and obligations of parties to contracts relating to realty and those of parties to contracts concerning personalty or personal services. Counsel for the petitioners in their brief concede that the rule laid down by Lord Coke is an insurmountable obstacle to the sustaining of their position and invite this Court to reject and overrule it. It is not our purpose in this portion of

the brief to argue the distinction between the cases relied upon by the petitioners and the question at issue. The foregoing dictum—if it be dictum—is important in connection with this review of the legislative and judicial history of the statute as at least a quasi-approval of the decisions of the lower Federal courts that claims for damages for loss of rent, as distinguished from claims for damages growing out of an anticipatory breach of a contract relating to personalty or personal services, were not provable in bankruptcy.

In *William Filene's Sons Co.* v. *Weed,* 245 U. S. 597 (1918), the Court allowed recovery of damages in an equity receivership, on a claim filed by the landlord under a clause whereby the tenant agreed to pay upon re-entry and termination for any default, or because of bankruptcy, the difference between the stipulated rental and the fair rental value at the date of entry. It may be observed in passing that no such provision is to be found in either of the leases in these cases, but as to such an obligation, the Court said (pp. 600-602):

> "The Circuit Court of Appeals seems to have considered also that the filing of the bill had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date. 230 Fed. Rep. 31. 144 C. C. A. 329.
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> * * * * * *
>
> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's

> hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741."

In the same volume, at the same term, and through the same justice, the Court, in *Gardiner* v. *Butler & Co.*, 245 U. S. 603 (1918), held unprovable in equity a claim for damages for loss of rent through breach of covenant to pay the same. In so doing, the Court said:

> "But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

In the same case, the Court cited *Central Trust Co.* v. *Chicago Auditorium Association, supra,* in support of the proposition that "in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee". By reference to Lord Coke's maxim and to the *Chicago Auditorium* case, the Court therefore not only gave full force to the former but interpreted the dictum in the latter as we have interpreted it, viz., as the recognition of a distinction between claims for the anticipatory

breach of a contract relating to personalty or to the performance of personal services and claims for breach of covenants in leases and other contracts involving the relation of landlord and tenant.

The excerpts quoted from *Central Trust Co.* v. *Chicago Auditorium Association, supra,* and *William Filene's Sons Co.* v. *Weed, supra,* may be dismissed as dicta, although, for reasons hereinafter given, we think they rise considerably higher in their authoritative effect. The decision in *Gardiner* v. *Butler, supra,* however, may not be so dismissed. It was the decision of the Court on the point at issue.

Moreover, dicta of this Court, particularly when taking the form of setting forth the distinctions between the case decided and other cases relied on to support a contrary view, are commonly and properly regarded by the lower courts and by the Bar as expressive of the views of this Court and, it may be assumed, are so regarded by Congress.

Eight Congresses assembled after the decision in the *Chicago Auditorium* case and seven after the decisions in the *Filene* and *Gardiner* cases, down to the beginning of 1933. During the same period, four amendments to the Bankruptcy Act were passed: on March 2, 1917; January 7, 1922; May 27, 1926; and February 11, 1932. If, as petitioners assert, the expressions of this Court, as well as the interpretation long since universally given to the Act, were at variance with the congressional intent, it is indeed strange that during this whole period no amendment of Section 63a was either enacted or introduced for the purpose of conforming the law to the intent of Congress.

In *Maynard* v. *Elliott*, 283 U. S. 273 (1931), likewise relied on by petitioners, this Court sustained the theretofore generally accepted view of the lower courts and the legal profession that the liability of a bankrupt-endorser of unmatured commercial paper was a provable claim, although contingent in nature, but was careful to point out that not all contingent claims were so provable, citing, as an illustration, *Atkins* v. *Wilcox*, 105 Fed. 595, which was a future rent case.

Since the enactment of the present Bankruptcy Act, there have therefore been four distinct expressions of opinion by this Court recognizing that claims for damages for loss of future rent, whether by reason of breach of the covenant to pay rent itself or of contracts of indemnity or for liquidated damages, were not provable in bankruptcy.

4. The foregoing review of the legislative and judicial history of Section 63a conclusively demonstrates that the long accepted interpretation thereof by Bench and Bar coincides with the intent of Congress itself.

To sum up the foregoing review of the legislative and judicial history of this section of the Act: Under prior acts, both in this country and in England, claims for damages for loss of future rent had been held to be unprovable in bankruptcy, even when the statute made express provision for proof and allowance of contingent claims. Prior to the passage of the present Act, a bill had been introduced in Congress making specific provision for the allowance of future rent claims, and the British act had

been so amended for the purpose of overcoming prior judicial decisions that they were not provable. Congress cannot be assumed to have been unmindful of the fact that, under previous decisions, in the absence of express provision in the statute, such claims were not provable, or unmindful of the express provisions made therefor in the Lowell bill and in the British act. It nevertheless made no express provision in Section 63a for their provability and allowance.

Thirty-three years ago and within two years after the passage of the Act, the rule theretofore applied both in this country and in England to statutes containing no such provisions was held to be applicable to the present Act. Such rule has been accepted and applied with substantial unanimity in a multitude of cases in the lower Federal courts ever since and has throughout this long period been accepted and followed by text writers and by the profession generally. This Court in four cases has expressed approval of the accepted rule, its first expressions having been uttered eighteen years ago. In all, since the enactment of the Act, down to the beginning of 1933, seven amendments were made to the Bankruptcy Act. In none of them has Section 63a been amended so as to change the accepted interpretation placed upon it, and at no time during such period has any amendment for that purpose been offered.

The foregoing circumstances are not only highly persuasive but conclusive that the long accepted interpretation of this section, followed by the courts below, corresponded to the intent of Congress itself and may not and should not now be overridden.

In enacting the Bankruptcy Act of 1898 without making specific provision for the provability of claims for damages for loss of future rent, notwithstanding the fact that such claims had been held to be unprovable in the absence of such specific provision in prior acts, both in this country and in England, Congress must have intended the omission of such provision to have the same effect.

In *Schall* v. *Camors,* 251 U. S. 239, this Court was called upon to decide whether tort claims were provable under the Bankruptcy Act of 1898 and held that as such claims had not been provable under earlier bankruptcy acts, the omission of Congress to provide for the provability of such claims in the Act of 1898 made it clear that tort claims were not provable under that Act. The Court said (pp. 250, 251):

> "Historically, bankruptcy laws, both in England and in this country, have dealt primarily and particularly with the concerns of traders. Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely *ex delicto.* [Citing previous statutes and decisions.]
>
> "Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63d section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures pro-

posed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the First Session of the 54th Congress. Having then failed of passage, it was submitted again in the Second Session of the 55th Congress as a substitute for a Senate bill; after disagreeing votes of the two Houses, it went to conference, and as the result of a Conference Report became law. It is significant that §63 defining 'Debts which may be Proved' remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print, the word 'interests' having been substituted for 'interest.' House Rep. No. 1228, 54th Cong., 1st sess., p. 39; House Rep. No. 65, 55th Cong., 2d sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause *b* fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. *Such claims might easily have been mentioned if intended to be included.* Upon every consideration, we are clear that claims based upon a mere tort are not provable." [Italics ours.]

In other words, the principle is the same as that involved in the rule that when Congress adopts or re-enacts a statute in substantially the same terms as a previous statute, it enacts with it the judicial interpretation which

has been placed upon such previous act. *The "Abbotsford"*, 98 U. S. 440, 444; *Kepner* v. *U. S.*, 195 U. S. 100, 124; *Northern Pacific R. R. Co.* v. *Musser-Sauntry Land, Logging & Manufacturing Co.*, 168 U. S. 604, 608; *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *Brewster* v. *Gage*, 280 U. S. 327, 337.

In effect, therefore, the omission of Congress to make future rent claims provable by express provision therefor in the statute is an expression of legislative intent that such claims should not be provable in bankruptcy. Whether this be so or not, certain it is that the silence of Congress in the face of long continued judicial construction of the statute must be considered as constituting an adoption of that construction by the legislative body. As stated in *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372:

> "Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government."

This Court has said that even if it were in doubt as to the meaning of an Act of Congress, it should hesitate to set aside the uniform construction over a long period of years by the lower Federal courts. *United States* v. *Ryan*, 284 U. S. 167, 174; see also *Maynard* v. *Elliott*, *supra*.

And the rule that the established construction of Federal statutes by administrative branches of the Govern-

ment will not be overruled by this Court, unless such construction is clearly violative of the express terms of the statute, on the ground that such established construction could not be disturbed without introducing "serious mischiefs", applies with even greater force to a long established construction of the Bankruptcy Act in the course of its *administration* by the lower Federal courts and referees in bankruptcy throughout the country. See *United States* v. *Bank of North Carolina,* 6 Pet. 29, 39; *Pease* v. *Peck,* 18 How. 595, 597; *Schell's Executors* v. *Fauche,* 138 U. S. 562, 572; *United States* v. *Alabama Great Southern R. R. Co.,* 142 U. S. 615, 621; *United States* v. *Jackson,* 280 U. S. 183, 193; *National Lead Co.* v. *United States,* 252 U. S. 140, 146.

The conclusion is unavoidable, therefore, that the judicial construction of Sec. 63a of the Bankruptcy Act, whereby claims for damages for breach of lease or loss of future rents are held not to be provable, has been tacitly adopted by Congress.

5. The amendment of March 3, 1933 was not, as asserted by petitioners, declaratory of the intent of the Act as originally passed.

By an act of March 3, 1933, Congress added a new Chapter Eighth to the Bankruptcy Act. 47 Stat. 1467. As stated in the petitioners' brief (p. 54), this chapter provided for bankruptcy proceedings for compositions and extensions in the case of individuals, and for extensions and reorganizations in the case of railroad corporations. Section 74(a) of the chapter added is as follows:

"74(a) Any person excepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by section 18(b) of this Act, accompanied in either case, unless further time is granted, by his schedules, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor.' The term 'creditor' shall include for the purposes of an extension proposal under this

> section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. *A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act.*" [Italics ours.]

Counsel concede that the amendment was not retrospective in effect (brief, pp. 55-56) as to claims in respect of which, as here, the time for filing claims had expired. Petitioners assert, however, that the amendment was declaratory.

If so, Congress took a long time and adopted a strange method to declare its original intent.

The Act had been in effect for thirty-five years. For thirty-three years Section 63a had been interpreted as excluding claims for damages for loss of future rent in any form. Seventeen years prior to the supposed declaratory amendment, this Court had expressed the same view by way of dictum; and fifteen years prior to this amendment, had decided that claims for damages for loss of future rent were not enforcible even in equity. There is nothing in the Congressional Record which indicates that any member of Congress regarded the amendment as declaratory. Were it otherwise, long acquiescence upon the part of Congress in the settled interpretation given to the Act during all these years is in itself sufficient to negative the remotest suggestion that the amendment passed at this late date was intended even by Congress itself to be declaratory. That it was not so intended is further evidenced by the fact that the new language introduced was not introduced as an amendment to Section

63a, but as a part of an added chapter relating to an entirely different subject and in itself complete as related to that subject.

The purpose of the added chapter, as stated by petitioners' counsel, was to provide for bankruptcy proceedings relating to compositions and extensions in the case of individuals and for extensions and reorganizations in the case of railroad corporations. For this purpose it set up a scheme of administration quite at variance with that contained in the Act in respect of bankruptcies generally. The scheme so set up was self-contained and complete. It would be idle to suggest that Chapter Eighth as a whole was declaratory of the original purpose of Congress in view of the fact that it was so at variance therewith and introduced new machinery and created new privileges and rights.

Neither will it be seriously contended that Section 74(a) of the added chapter was, as a whole, declaratory of the original Act. It likewise was at variance therewith. By its very terms, the new definition of the word "debt" so as to include claims for future rent is limited to "the purposes of an extension proposal under this section" (Section 74a), and by the very terms of the Act, the new definition of the word "creditor" so as to include holders of claims for future rent is similarly limited.

For the purpose of sustaining their contention that this new Act is in any way declaratory of the intent of the original Act, counsel for the petitioners are driven to wrest the last sentence of Section 74a forcibly from that section and from its context and convert it into an amendment of the Act generally. For Congress so to have

amended Section 63a would have been a strange procedure indeed.

The cases in which an amendment to an existing act of Congress has been held to be declaratory of the original act instead of an amendment changing the law for the future are rare indeed. Petitioners have cited none in which such an amendment has been held to be declaratory where its effect is directly contrary to previous judicial interpretation of the same statute. Even in cases where no constitutional rights are violated, it is clear that courts will not give a retrospective effect to a declaratory law unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it, and even in such cases, as stated in *Salters* v. *Tobias*, 3 Paige 338 (N. Y., 1832) at p. 344,

> "Courts will treat such laws with all the respect which is due to them as an expression of the opinions of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it."

See also *Koshkonong* v. *Burton*, 104 U. S. 668, 678; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 439; *United States* v. *Stafoff*, 260 U. S. 477, 480; Black on Interpretation of Laws (2nd ed.) § 181.

As already pointed out (p. 33, *supra*), failure of Congress to amend a statute which has been interpreted over a course of years in a certain way in itself indicates that the judicial interpretation corresponded to the congressional intent. To give to the amendment of

1933 the effect of a declaratory statute would so fly in the face of this rule, in view of the history hereinbefore reviewed, as to impugn the intelligence of both Congress and the courts.

In none of the cases cited by petitioners had there been any prior judicial interpretation contrary to the amendments referred to, which were construed to be of a clarifying character and declaratory because in harmony with the interpretation placed upon the statute by the courts. In one of them, *Cope* v. *Cope,* 137 U. S. 682, the subsequent act was so phrased as to be held by the Court not to be declaratory that the original intent of the two acts were the same but as declaratory of a contrary intent in the prior act. Such, we think, is the interpretation to be placed upon the amendment of 1933, however restricted or general in its scope, when considered in the light of previous judicial history of the Act.

What constitutes a declaratory statute has never been clearly defined. The most familiar case of a declaratory statute, of course, is one declaratory of the common law, as to which the test is fairly simple. A mere amendment to an act itself, particularly where the language speaks *in futuro,* would according to ordinary interpretation constitute a change in the law for the future and be neither a retrospective enactment or a declaration of the meaning of the prior act, retrospective statutes not being favored. *United States* v. *Magnolia Petroleum Co.,* 276 U. S. 160, 162; *White* v. *United States,* 191 U. S. 545, 552; *Shwab* v. *Doyle,* 258 U. S. 529, 534.

In any event there must be some indicia within the language of the act that it was intended to be declara-

tory of the prior act itself rather than to change the law for the future. The most certain way of accomplishing this purpose would be the enactment of a statute which in its terms was declaratory of the meaning of the previous act. The 1933 amendment contained no such statutory declaration.

The question in this case turns upon the definition to be given to the word "debt" in the Act of 1898. If Congress had intended the amendment to have the effect urged by the petitioners, seemingly it would have at least been enacted in the form of a definition of the word "debt", *e.g.*, by providing that the word "debt" as used in the act or in Section 63(a) thereof "should be deemed to include claims for future rent". This it did not do. On the contrary, by preceding language in the same section in which it did undertake to define the word "debt" as used in the Act, its definition is confined so as to be limited to extension proposals made under the section itself, as hereinbefore pointed out. Moreover, the language relied on not only speaks *in futuro* but does not in terms refer to Section 63(a), which is the section enumerating classes of claims provable, but to Section 63b, which provides for the liquidation of unliquidated claims *when* provable. The added sentence may, as counsel assert, have been surplusage, but its obvious purpose was to provide that the claims for future rent, made provable for the limited purposes of the section by its preceding language, should be liquidated as other provable claims are liquidated under Section 63b.

If Congress had intended the last sentence of Section 74(a) to apply not only to extensions, but also to ordinary bankruptcy proceedings, the other references to

future rent contained in Section 74(a), as well as the provision in Section 77 making claims for future rent provable debts in a railroad reorganization, would have been unnecessary surplusage. It should also be noted that to make the last sentence of Section 74(a) (which Section is entitled "Compositions and Extensions") apply to the entire Bankruptcy Act, would be to violate the canons of construction laid down in United States Code, Title I, Section 24, (See Act of February 25, 1871, c. 71 §1, 16 Stat. 431) requiring that each section shall "be numbered, and shall contain, as nearly as may be, a single proposition of enactment." Petitioners on page 59 of their brief argue that the words "under this Act" as used in Section 74(a) immediately preceding the last sentence show that Congress was speaking of provable claims under the Bankrupcty Act. This argument distorts the natural meaning of the words. It is perfectly plain that Congress intended to make provable, for purposes of extensions, certain classes of claims, including claims for future rent, which were not provable under the Bankruptcy Act in ordinary bankruptcy proceedings.

That Congress did not intend that the last sentence of Section 74a should be applicable to ordinary bankruptcy proceedings, is also indicated by the provisions of Section 73 of the Act of March 3, 1933, providing

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings *for the relief of debtors, as provided in Sections 74, 75 and 77 of this Act.*" [Italics ours.]

and also by the provisions of Section 2 of the Act of March 3, 1933, providing

> "This Act shall take effect and be in force from and after the date of its approval, and shall apply as fully to *debtors, their stockholders and creditors,* * * *" [not bankrupts, their stockholders and creditors,]. [Italics ours.]

Following the enactment of the Act of March 3, 1933, the House of Representatives, during the ensuing special session of Congress, on June 5, 1933 passed H. R. 5884 (which is now pending in the Senate). This bill, among other things, contained a proposed amendment of Section 63a of the Bankruptcy Act to make claims for damages respecting executory contracts, "including future rents whether the bankrupt be an individual or a corporation", provable claims (and by implication excluded such claims in pending bankruptcies). It is evident that this amendment was intended not as a mere clarifying change in the text, as suggested by petitioners (brief, p. 64), but as a change in the existing law, as indicated in the Report of the House Committee on the Judiciary (House Rept. No. 194, 73rd Cong., 1st Session) and that the Act of March 3, 1933, was not regarded as having declared that claims for damages for loss of future rent constitute provable claims in ordinary bankruptcy proceedings.

In short, to give to the last sentence of Section 74(a) the effect of an act declaratory of the intent of a prior Congress sitting 35 years ago is to disregard the context as well as to disregard the rules generally applicable in respect of amendments made to change a long established interpretation of the statute amended.

Moreover, if intended to be declaratory, the declaration is not binding upon the courts, whose function it is to construe the act as originally written by reference not only to the words employed but to the history of the act and the interpretation generally placed thereon in the interim.

6. In view of the legislative and judicial history of the Act the Court should affirm, because there is lacking in the statute itself that compelling language which alone would warrant the Court in overturning an interpretation of the Act followed and accepted by Bench and Bar practically ever since its enactment.

a. THERE IS NO COMPELLING LANGUAGE IN THE STATUTE REQUIRING THE OVERTURNING OF THE LONG ESTABLISHED INTERPRETATION.

This case, although distinguishable on other points, as hereinafter set forth, is like *Maynard* v. *Elliott*, 283 U. S. 273, in that the Court is asked to overturn an interpretation of the Bankruptcy Act which has been accepted and followed with substantial unanimity ever since its passage. In declining so to do, in that case, the Court said (pp. 276-277):

> "Within three years after the enactment of the Bankruptcy Act, the Court of Appeals for the Third Circuit, in *Moch* v. *Market Street National Bank, supra*, held that the liability of a bankrupt endorser of commercial paper, which did not mature until after the filing of the petition, was a provable claim under § 63 (a) (4). This ruling was followed by the Court of Appeals for the Second Circuit in *In re Semmer Glass Co., supra*, and

> appears to have been accepted by the Court of Appeals for the Ninth Circuit, *Colman Co.* v. *Withoft, supra,* p. 253, and by the district courts generally. [Citing numerous cases.]
>
> "The rule thus announced seems not to have been seriously challenged until the decision, twenty-six years later, of the Court of Appeals for the Sixth Circuit in *First National Bank* v. *Elliott, supra.* * * * In the meantime, leading text writers have stated that the liability of an endorser, upon a note falling due after the petition, is provable under § 63 (a) (4). 1 Loveland on Bankruptcy (4th ed.) p. 609; 2 Collier on Bankruptcy (13th ed.) pp. 1399-1400; 2 Remington on Bankruptcy (3rd ed.) § 777.
>
> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance. * * *"

Every circumstance present in that case leading to the conclusion stated is present here, including the far reaching consequences of overturning the established practice in respect of the disposition of landlords' claims in bankruptcy. (As to such practical consequences, see pp. 47-51, *post.*) In addition, there are expressions of this Court on the question in dispute not to be found in respect of the question before the Court in *Maynard* v. *Elliott.*

The rule that only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted is neither novel nor new. Courts have repeatedly given weight to the interpretation

placed upon a statute by the courts, administrative branches of the Government and the Bar, when long continued and generally accepted. If such interpretation is clearly wrong, no court is, of course, bound to follow it. But where the question is in any way debatable, orderly administration of justice requires that an interpretation accepted and followed for a long period of time by substantially all courts and concurred in, albeit through dicta, by the court of last resort should not be overthrown. (cases *supra*, pp. 33-34.)

It is not contended by petitioners that the plain wording of the statute itself requires the interpretation placed upon it by them. Any such contention, if made, would be untenable. Claims for future rent are clearly not debts within the ordinary meaning of the word. Whether they are claims or demands, contingent or otherwise, depends upon their legal characteristics; and, if regarded as contingent claims or demands, whether they are provable or not, requires interpretation of the Bankruptcy Act. As the Court was careful to point out in *Maynard* v. *Elliott*, not all contingent claims are provable, even when founded on contract. The question is therefore one which calls for interpretation.

In such circumstances, we know of no better guide by which to determine whether the language of the statute itself is compelling to a certain conclusion than by a consideration of the decisions of the courts which have been called upon to determine the question. In this case, as evidenced by the foregoing review, the lower courts, with substantial unanimity, have held that claims for damages for loss of future rent are not provable in bankruptcy. Many of the very same courts which prior

to *Maynard* v. *Elliot*, held that the liability of a bankrupt-endorser of commercial paper was a provable claim also held that claims for damages for loss of future rent were not provable.* None of these courts saw any inconsistency between the two rules.

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*Cases applying rule that claims for damages for loss of future rent are not provable.

Cases applying or approving rule that claims against bankrupt endorsers on unmatured notes are provable.

FIRST CIRCUIT

Slocum v. *Soliday*, 183 Fed. 410 (C. C. A. 1st, 1910).

In re Ells, 98 Fed. 967 (D. C. Mass., 1900);

In re Shaffer, 124 Fed. 111 (D. C. Mass., 1903);

In re Smith, 146 Fed. 923 (D. C. R. I., 1906);

In re O'Donnell, 131 Fed. 150 (D. C. Mass., 1904);

In re Amdur Shoe Company, 13 Fed. (2d) 147 (D. C. Mass., 1926).

SECOND CIRCUIT

In re Roth & Appel, 181 Fed. 667 (C. C. A. 2d, 1910);

In re Metropolitan Chain Stores, Inc., 66 Fed. (2d) 482 (C. C. A. 2d, 1933);

In re Wise Shoes, Inc., 2 Fed. Supp. 521 (D. C. S. D. N. Y., 1932), aff'd 64 Fed. 1023.

In re Philip Semmer Glass Co., 135 Fed. 77 (C. C. A. 2d, 1905);

In re Buzzini & Co., Inc., 183 Fed. 827 (D. C. S. D. N. Y., 1910);

In re Rothenberg, 140 Fed. 798 (D. C. S. D. N. Y., 1905).

SIXTH CIRCUIT

In re Pennewell, 119 Fed. 139 (C. C. A. 6th, 1902);

Wells v. *21st Street Realty Co.*, 12 Fed. (2d) 237 (C. C. A. 6th, 1926);

In re McAllister-Mohler Co., 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930).

Germania Savings Bank & Trust Co. v. *Loeb*, 188 Fed. 285 (C. C. A. 6th, 1911);

Courtney v. *Fidelity Trust Co.*, 219 Fed. 57 (C. C. A. 6th, 1914).

NINTH CIRCUIT

Colman Co. v. *Withoft*, 195 Fed. 250 (C. C. A. 9th, 1912).

Colman Co. v. *Withoft*, 195 Fed. 250 (C. C. A. 9th, 1912).

This Court itself, by its decision in *Gardiner* v. *Butler,* 245 U. S. 603, and by its dicta in the other cases cited (I, 3, pp. 24-29, *supra*), has given expression to the view that such claims are not provable in the very cases which petitioners now claim are inconsistent with such conclusion.

In the face of these judicial opinions, it clearly cannot be said that the statute itself contains that compelling language which, as stated in *Maynard* v. *Elliott,* would alone warrant the over-turning of an interpretation of the Act so long accepted and followed by Bench and Bar.

b. As in *Maynard* v. *Elliott,* to overturn the settled practice of more than thirty years would involve serious consequences.

It should be obvious without elaboration that overturning by judicial decision the settled practice of over 30 years would have serious consequences, a circumstance given recognition in *Maynard* v. *Elliott.*

In the meantime, thousands of bankrupt estates have been administered, thousands of bankrupts discharged, the rights of their creditors determined and distribution made in accordance with such settled practice. At the present time hundreds, perhaps thousands, of bankrupt estates are in the course of administration. In some, time for filing proof of claims has expired, in others not. In some, final distribution is imminent, in others compositions effected or agreed upon. In all, save the limited number of individual extensions and compositions affected by the amendment of 1933, these estates have been administered in accordance with the interpretation and practice so long accepted and followed.

Some landlords, like the petitioners, have attempted to make proof of claims for loss of future rent. Others have not. This is true of the United Cigar Stores bankruptcy, one of those involved in the instant cases, in which the time for filing claims has expired. The result of over-turning the present rule, therefore, would be to discriminate as between landlords. On the other hand, if it is proper that the rule be changed—a question upon which there is a difference of opinion—such change should be made by Congress and should be made applicable only to future cases. Only confusion and injustice could result, however, from changing the existing rule by judicial decision.

The foregoing considerations relate to questions of legal machinery and discrimination among landlords. There are more fundamental consequences affecting business engagements, extensions of credit and the rights of creditors past, present and future. As a result of the long accepted rule of law, banks, merchandise creditors and others in granting credit have assumed that, in case of any insolvency, the tangible assets of the borrower would be available for such creditors to the exclusion of landlords asserting claims for loss of future rent. Corporate balance sheets do not show liability for future rent either as a fixed or contingent liability and banks and merchants have advanced funds and merchandise, and manufacturers have sold goods and advanced credit, on the basis of such balance sheets. Doubtless, credit so obtained in many instances has enabled the borrowing enterprise to avoid bankruptcy and survive temporary financial embarrassment. The effect of over-turning the established practice by judicial decision at this late date

would be to dislodge these creditors from their present position, depriving them of a portion of the security upon which they relied and subjecting them to hazards which they did not anticipate in extending credit and which they had a right to assume did not exist.

It is equally obvious that to over-turn the existing practice will require banks, manufacturers, merchants and others extending credit to reconsider and revise all existing lines of credit in the light of the new rule, in many instances to the disadvantage of the borrower. Indeed, such revision may well precipitate bankruptcies which would not otherwise occur.

It would seem that whether such far reaching consequences in respect of both past and future transactions should be brought about by changing existing practice is a matter which should primarily be determined by Congress. Certainly it can be more effectively dealt with legislatively than judicially.*

The effect of a change in the existing practice would vary to the extent that landlords' claims are large or small. Petitioners in their brief lay particular stress upon the hardship falling upon landlords of large chain stores, such as United Cigar Stores Company of America, one of the bankrupts involved in the instant cases. This, of course, is because in the case of such

*Petitioner's brief (p. 33) argues that under the existing practice a corporate tenant with sufficient assets to pay all other classes of creditors may, for the purpose of escaping liability on leases, file a voluntary petition in bankruptcy. The argument assumes that the corporation or its stockholders can through bankruptcy benefit at the expense of those having prior rights. In this connection see *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482; "Landlord Claims in Reorganization" by William O. Douglas and Jerome Frank, 42 Yale Law Journal 1003 (1933).

estates there are numerous long term leases at high rentals. The aggregate of landlords' claims in such cases is very large and represents a high percentage of all claims. While landlords in such cases may suffer, their leases could not have been entered into in any other expectation than that in the event of bankruptcy their claims would not be provable. Other creditors have extended credit to such corporations upon the same hypothesis. As between the two classes of creditors the equities of the latter would seem to be superior.

In considering the practical consequences of a change in the existing rule, it is self-evident that the longer the lease the less likelihood of ultimate loss to the landlord through re-entry and reletting, but at the same time the greater proportion of the bankrupt estate which would be absorbed by him where the bankruptcy occurs during a period of depression. In other words, the longer the term the greater the uncertainty of any loss, but the greater the certainty that the landlord will receive a disproportionately large part of the proceeds of sale. Among all creditors, landlords are the only ones who, to any substantial degree, if at all, receive their property back in the condition in which delivered to the tenant, and at the same time, if the existing rule be changed, will be permitted to share in the distribution of the bankrupt estate, to which, of all creditors, they have contributed nothing. There is no distinction between the legal status of such a landlord whose lease runs 10, 20 or 100 years into the future and one whose lease expires within a single year. If the petitioners prevail, there is little likelihood that the former will suffer any actual loss; yet they will be entitled to recover from the estates amounts 10, 20 or

100 times those recoverable by landlords with short term leases, to the prejudice of the latter, as well as of banks and merchandise creditors who have put real value into the estate and have no chance to recoup their losses other than through participation in the distribution of its assets. This presents a practical problem of real importance which Congress could meet either by limiting the percentage of landlords' claims which might be provable or the period of leases under which such claims might be provable, or providing that the landlord, if he desired to participate in the distribution of the estate's assets, should throw his lease into the pot to be sold along with the other assets of the bankrupt.*

It is thus made apparent that the greatest confusion and much injustice would result from over-turning by judicial decision the well settled practice, which would not and could not have arisen had the practice been different from the start. These consequences are not such as to warrant the Court in affirming, if there is in the statute itself compelling language requiring reversal. These are circumstances, however, which should lead the Court in the absence of such compelling language to follow the long established rule.

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*A distinguished committee under the chairmanship of Mr. Paul H. King, Chairman of the Committee on Uniformity of Practice of the National Association of Referees in Bankruptcy, has suggested certain amendments to the Bankruptcy Act dealing with the provability of future rent claims, which indicate the belief on the part of the committee that such legislation should not simply declare that damages for loss of future rent shall be provable, without more. A copy of the present draft of amendments suggested by such committee in this connection is set forth in the brief herein of Godfrey Goldmark as *amicus curiae* (p. 7).

II

THE LONG ACCEPTED INTERPRETATION OF THE ACT UPON WHICH THE DECISIONS BELOW ARE BASED IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND IS SUPPORTED BY WELL ESTABLISHED AND LONG RECOGNIZED PRINCIPLES OF LAW (Answer to Points I, III, IV, V, VI of Petitioners' Brief).

Petitioners argue in Point I of their brief that the grounds for the decision of the leading case in the Second Circuit which was followed by the courts below have been overruled by the decisions of this Court; in their Point IV, that under the principles announced in the decisions of this Court, reviewed in their Point III, claims for damages for loss of future rent are provable in bankruptcy; in their Point V that there is no distinction between such claims and claims founded on breach of executory contracts relating to personalty or to the performance of personal services; and in their Point VI that the same rule is applicable to claims for future rent whether arising from breach of a simple covenant to pay rent or under an indemnity or acceleration clause. Taken together, these several subdivisions of petitioners' brief are parts of but a single argument, to wit: (1) that the generally accepted rule reviewed in Part I of this brief is inconsistent with the decisions of this Court, and (2) that under such decisions, and upon principle, claims for damages for loss of future rent are provable in bankruptcy. This argument, and the several subdivisions of petitioners' brief in which it is presented, will be answered

together, except that Point I will be dealt with in part III of this brief in the discussion with reference to indemnity contracts, to which the case discussed in Point I of petitioners' brief relates.

As indicated in the foregoing summary of petitioners' argument, and as evidenced by petitioners' brief (Point VI), it is the petitioners' contention that there is no distinction between the status of claims arising under an indemnity covenant and claims arising under a simple covenant to pay rent. Petitioners' position is predicated in the first instance upon the broad ground that all claims for damages for loss of future rent are provable in bankruptcy and stand upon the same footing as claims for damages for breaches of covenants and of contracts relating to personalty or to the performance of personal services. In a subsequent subdivision (Part VII), petitioners argue that even if this be not so, claims arising under the particular clauses contained in the leases involved in these cases are so provable. We shall adopt the method of approach pursued by the petitioners, and first discuss the questions presented in the light of their broader aspect as presented by petitioners' brief and thereafter and in the immediately succeeding section of this brief (III, at p. 67 *post.*) address ourselves to the particular provisions of the particular covenants relied on by the petitioners in these cases.

Of the decisions of this Court relied on by the petitioners, none are cases involving the provability in bankruptcy of claims for damages for loss of future rent, whether arising from breach of simple covenants to pay rent or from breach of covenants of indemnity or of

some other description. On the contrary, as already pointed out, this Court, in at least three of the cases relied on by petitioners, has distinguished between claims for damages growing out of the anticipatory breach of contracts relating to personalty or the performance of personal services, and claims for damages for loss of future rent, and by the making of such distinction has clearly indicated—whether such expressions be regarded as dicta or as a part of the decision of the Court—that the latter are not provable in bankruptcy. In its last analysis, the contention of petitioners is that there is no distinction between these two classes of cases, that in expressing the existence of such a distinction this Court was wrong, and that the Court should now hold, despite the accepted interpretation of the Act generally for a period of over 30 years, that there is no distinction and that all claims for damages for loss of future rents, like claims growing out of the anticipatory breach of contracts relating to personalty and to the performance of personal services, are provable in bankruptcy. Unless the petitioners shall sustain this contention, the primary and broad ground upon which they seek a reversal of these cases must fall.

The whole argument of petitioners as contained in the various subdivisions of their brief noted above is summed up under Point VI (p. 40) as follows:

> "The question narrows down to the contention that in the application of the bankruptcy law a distinction must be made between a claim for damages for loss of future rents under a lease of personalty and one for loss of future rents under a lease of realty.

* * * * * * * *

> "With due respect for Lord Coke's quaintly spelled maxim and for the ancient law, we submit that in the application of the Bankruptcy Act such a distinction has no place. It is highly technical. There is no practical difference between the two cases so far as the purposes of the bankruptcy system are concerned. The Act itself makes no exception of contracts for lease of realty and its purposes are defeated if the claim is not provable and, therefore, not discharged, and if the landlord may pursue the bankrupt after discharge. The distinction loses sight of the fact that it is competent for the Congress, notwithstanding the technical law of landlord and tenant, to absolve every bankrupt tenant from his liabilities, and to allow the landlord a provable claim for his loss. As pointed out in Point IX of this brief, England, the place of origin of our law of landlord and tenant, long ago did that very thing."

With regard to the law of England, it is pertinent to observe that it took an act of Parliament to abolish the distinction predicated upon what petitioners concede to be "the technical law of landlord and tenant" and the law governing contracts relating to personalty or to the performance of personal services. That result, which required an act of Parliament in England, petitioners request this Court to achieve by judicial decision contrary to the distinction recognized at common law ever since the days of Lord Coke and to the general acceptance of such distinction not only by the lower Federal courts and the text writers, but by this Court in its previous decisions. Furthermore, the case of *Dunbar* v. *Dunbar*, 190 U. S. 340, constitutes a complete

answer to the contention of the petitioners in Point IX of their brief, that this Court should follow the rule now applicable in England as a result of express provisions in the British Bankruptcy Acts since 1869 permitting the proof of claims for damages for loss of future rent. In *Dunbar* v. *Dunbar,* this Court refused to follow English cases decided under the broad provisions of the British Bankruptcy Acts of 1869 and 1883 expressly allowing proof of all claims, however contingent. (See pp. 14-16, *supra;* petitioners' brief, pp. 47-52.) On the contrary, this Court applied and followed English cases decided under British Acts prior to those of 1869 and 1883. In other words, the only decisions of the English courts which bear on the construction of our Bankruptcy Act of 1898 are those decided prior to the British Bankruptcy Act of 1869, which cases, it is admitted by petitioners (brief, p. 46) refused to allow claims for damages for loss of future rent.

The "technical law of landlord and tenant" referred to in the foregoing excerpt from petitioners' brief, is to be found in the rule that, while breaches of executory contracts relating to personalty and to the performance of personal services give rise to claims for damages, the landlord by re-entry and termination terminates all liability of the tenant to pay rent, and that upon such re-entry and termination no cause of action in favor of the landlord for the recovery of damages for the consequent loss of future rent arises: *Treff* v. *Gulko,* 214 Cal. 591 (1932); *Carson* v. *Arvantes,* 10 Colo. App. 382 (1897); *Cunningham* v. *Stockton,* 81 Kan. 780 (1910); *Lansalot* v. *Mihaljevich,* 12 La. App. 174 (1929); *Sutton* v. *Goodman,* 194 Mass. 389 (1907); *Galbraith* v. *Wood,* 124

Minn. 210 (1914); *Chaude* v. *Shepard,* 122 N. Y. 397 (1890); *Staton* v. *Robinson,* 150 Okla. 234 (1931); *Yuen Suey* v. *Fleshman,* 65 Ore. 606 (1913); *De Long Hook & Eye Co.* v. *Tait,* 108 Pa. St. 369 (1933); *Walling* v. *Christie & Hobby, Inc.,* 54 S. W. (2d) 186 (Tex., 1932); *Crowder* v. *Virginian Bank of Commerce, Inc.,* 127 Va. 299 (1920); 1 Tiffany on Landlord & Tenant, § 182j, p. 1174.

It is this rule of law, covering cases arising out of the relation of landlord and tenant, and the consequent distinction between claims for loss of future rent in such a case and claims for the breach of executory contracts relating to personalty or to the performance of personal services, that this Court recognized and followed in *Gardiner* v. *Butler,* 245 U. S. 603, wherein it specifically referred to Lord Coke's maxim as expressive thereof and to the language of the court in the *Chicago Auditorium* case in further support. When this substantive rule of law and the resulting distinction is borne in mind, the distinction becomes plain between cases involving the provability of such claims on the one hand and those involving the provability of claims arising out of the breach of executory contracts or covenants relating to personalty or to the performance of personal services on the other hand, as recognized and expressed in the decisions both of the lower courts and of this Court.

The distinction is perhaps best illustrated by the *Chicago Auditorium* case, one of the cases relied on by the petitioners. In that case, the Court held that a claim for damages growing out of an anticipatory breach of a contract for the continuing performance of personal

services was provable in bankruptcy. At the same time, the Court distinguished between such a case and a case involving a claim for damages for loss of future rent, basing the distinction upon Lord Coke's maxim which was quoted in the opinion itself. This maxim may be, as stated in petitioners' brief, "quaintly spelled" and expressive of ancient law, but it is likewise expressive of existing law relating to cases growing out of the relation of landlord and tenant (cases, pp. 56-57, *supra*), as recognized by this Court in the *Chicago Auditorium* case and in *Gardiner* v. *Butler, supra.*

The fundamental distinction is that the anticipatory breach of a contract relating to personalty or to the performance of personal services, such as was involved in the *Chicago Auditorium* case, gives rise to an action in damages, whether such anticipatory breach is committed by a person who is wholly solvent or results from the fact that bankruptcy has disenabled the party bound from performing; whereas breach of a covenant to pay rent gives rise to no such cause of action. Breach of a covenant to pay rent, followed by a re-entry and termination by the landlord, would give rise to no cause of action in favor of the landlord were the tenant solvent. Consequently, it gives rise to no claim where the breach of such covenant is the result of bankruptcy. This being so, the claim asserted is not even a contingent claim since all liability of the tenant, whatever the occasion for the default, is extinguished by re-entry and termination of the lease on the part of the landlord.

Counsel for the petitioners asserts that there is no distinction and should be none between a claim for damages for loss of future rents predicated upon the breach

of a simple covenant to pay rent, whether the lease also contains a covenant of indemnity or other covenants having the same purpose. In this counsel for petitioners is at one with the Circuit Courts of Appeals and the District Courts which have recognized the absence of any such distinction and have applied the same rule in both classes of cases. (cases, pp. 20-21, *supra.*)

As heretofore pointed out, it is significant that this Court in the *Chicago Auditorium* case, in directing attention to the distinction between claims for future rent and claims arising out of the breach of executory contracts relating to personalty, cited decisions of the lower Federal courts applying such rule to contracts of indemnity, similar to those in this case, and to claims arising from the breach of other covenants contained in leases as well as to claims asserted to accrue by reason of the breach of a simple covenant to pay rent. (See excerpt from opinion, p. 24, *supra.*) It may not be assumed that the citation of these cases was inadvertent or other than advisedly made. All were stated to be distinguishable from the case presented in the *Chicago Auditorium* case upon the ground that the former were cases arising out of the relation of landlord and tenant and governed by Lord Coke's maxim. The language employed in that case and the reference to these several classes of landlord and tenant cases as distinguishable from the case then under decision would be dismissed by counsel for the petitioners as dictum. As appears from the opinion, the cases cited had been called to the attention of the Court as in conflict with the contention that claims involved in the *Chicago Auditorium* case were provable.

The Court met this contention by pointing out the distinction between the two classes of cases. The determination of the existence or absence of such a distinction would appear to have been necessary to the determination of the case. In any event, whether a part of the decision itself and the determination of a point necessary thereto, or dictum, the Court saw fit to make the distinction, and the dictum, if it be dictum, was expressive of existing law.

Moreover, in the subsequent case of *Gardiner* v. *Butler, supra,* the Court, in addition to referring to Lord Coke's maxim, referred to the *Chicago Auditorium* case in support of its ruling that claims for damages for loss of future rents were not provable in equity.

The distinction may be based upon "the technical law of landlord and tenant",* but substantially all rules of law governing real estate and the rights of parties growing out of title thereto, its use and possession and the rights of persons under instruments relating thereto, are likewise technical.

The foregoing also disposes of the additional cases cited under Point V of petitioners' brief (pp. 34-35), each of which involved a contract relating to personalty or to strictly personal obligations and not to one arising out of the relation of landlord and tenant.

Williams v. *United States Fidelity & Guaranty Co.,* 236 U. S. 549, is distinguishable upon the same ground,

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*This Court's language in the *Chicago Auditorium* case with reference to this distinction has been interpreted as we interpret it in well reasoned opinions in the lower Fedral courts. See *In re Schulte-United, Inc.,* 2 Fed. Supp. 285 (D. C. S. D. N. Y., 1932); *In re McAllister-Mohler Co.,* 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930).

to wit, it did not arise out of the relation of landlord and tenant or of covenants contained in leases creating such relation. This case is further distinguishable, since it appears from the opinion itself that the construction contract, for which the claimant had given a construction bond, had been abandoned by the contractor more than six months before he filed his petition in bankruptcy, that the other party to the building contract had taken possession and completed the structure prior to the bankruptcy of the contractor and had, also prior to bankruptcy, made its demands for payment of the amount expended beyond the contract price. The liability of the surety had therefore become a matured and subsisting liability and demand for its observance had been made prior to bankruptcy. The only thing which remained was the liquidation of the amount due, but all facts, upon which depended the determination of the extent of such liability, were known on the date of bankruptcy for the reason that the structure had been completed. In other words, every event necessary to determine both the fact of liability of the surety, and its amount, had taken place prior to bankruptcy, and appropriate demand therefor had been made. The claim, therefore, was from every point of view a presently existing claim. Whether or not the surety could have maintained an action against the contractor at the date of the latter's bankruptcy, had bankruptcy not intervened, the surety at that date not having made any payment under the construction bond, it is clear that the holder of the bond had a provable claim at the date of bankruptcy which, in fact, was proved by him and allowed, and which, had he not done so, could have been proved by the surety under the express provisions of Section 57(i) of the Bankruptcy Act. Accordingly, the

surety's right over against the principal, being as this Court said "ancillary" to a provable claim which the surety might have proved had the creditor not done so, was discharged.

Maynard v. *Elliott, supra,* is likewise distinguishable upon the ground that it was not a claim arising out of the relation of landlord and tenant or out of covenants relating to the use and occupation of land. It was not a rent case but a note case. The Court had already, in the previous cases hereinbefore referred to, distinguished between rent cases and cases involving purely personal obligations and nothing in the *Maynard* case discloses any departure from the recognition of such distinction. Moreover, that case, as we read it, was based primarily upon the ground that the provability of a bankrupt-endorser's liability upon commercial paper had been the accepted interpretation of the Bankruptcy Act almost ever since its passage. Under these circumstances the Court held that only compelling language in the statute itself would warrant it in overturning an interpretation of the Act so long accepted and followed, and upon an examination of the statute found no such compelling language therein. Future rent claims during the same period have, with the same substantial unanimity, been held *not* to be provable.

Maynard v. *Elliott* was not a case the purpose and effect of which was to revolutionize either the principles governing the interpretation of the Bankruptcy Act or the practices thereunder. It was a very simple case based upon the familiar rule that an interpretation so long accepted and followed generally should not be overturned in the absence of such compelling language. In its refer-

ences to the statute and to the decisions thereunder in the subsequent part of the opinion, the Court, it is true, held that a claim is not to be disallowed merely because contingent upon date of bankruptcy, but was then careful to point out that not all contingent claims were so provable, citing as an illustration of this cautionary expression *Atkins* v. *Wilcox,* 105 Fed. 595, which was a future rent case. Seemingly, the Court went out of its way to make it plain that, in sustaining the previously accepted interpretation of claims arising through the endorsement of commercial paper, it did not mean to overturn the equally long established interpretation placed upon the Act in respect of claims for future rent. In addition, as we have seen, a claim for damages for future rent is not, under the established rules of law concerning cases arising out of the relation of landlord and tenant, even a contingent claim, since default upon the part of a solvent tenant gives rise to no right to the recovery of damages. The very same courts found nothing inconsistent between the rule affirmed in *Maynard* v. *Elliott* and the rule rejecting claims for future rent. (Footnote p. 46, *supra.*)

Kothe v. *R. C. Taylor Trust,* 280 U. S. 224, does not help the petitioners. In that case, the Court disallowed a claim based upon a covenant, in the event of automatic termination upon bankruptcy, to pay damages equal to the amount of rent reserved for the residue of the term. In so doing, the Court treated this covenant as creating a penalty and requiring the payment of sums having no reasonable relation to any probable damage resulting from the breach. The argument of the petitioners is that the Court, by so holding, excluded by inference the existence of ground for rejecting the claim

under the generally accepted rule. But it was not necessary for the Court to give expression to every ground upon which the claim might be rejected. In the light of this Court's views as expressed in the cases referred to above (I, 3, pp. 24-29, *supra*) it is difficult to see how this Court's opinion in the *Kothe* case can be taken to indicate that the claim would have been allowed if the obligation had been different or had more nearly corresponded to the payment of actual damages. Certainly there is nothing in the opinion to indicate that a claim based upon particular covenants such as in these cases would be provable in bankruptcy when it would not have given rise to any present liability had the tenant remained solvent.

William Filene's Sons Co. v. *Weed,* 245 U. S. 597, is the only case cited in which a claim for damages for loss of future rent was allowed. This was an equity case and not a bankruptcy case. In the dictum hereinbefore quoted (pp. 26-27, *supra*), the Court clearly intimated that the claim would not have been allowable in bankruptcy. Otherwise there was no occasion for the dictum. It was inserted, without doubt, for the purpose of removing the contention which might otherwise have been made that the Court intended by that case to overturn the long accepted interpretation of the Bankruptcy Act concerning such claims. The Court pointed out that where a court is administering a statutory system it must administer it according to the statute, but that the lower court was wrong in assuming that the rule applicable under the statutory proceedings in bankruptcy was likewise applicable in equity. Having so stated, the Court said that when a court without a statute takes possession of all the assets of a corpo-

ration and makes it impossible to collect debts except through the court, there is no warrant for excluding creditors or introducing equities other than those determined by the contracts the debtor made. In other words, the Court merely held that, where the case was one arising under the general equity jurisdicition of a court, it was free to provide for such distribution of the assets as were consistent with both the powers and obligations assumed by the court in such a proceeding.

Moreover, this case must be read in the light of the immediately succeeding case of *Gardiner* v. *Butler, supra,* in which the Court expressly disallowed, even in an equity proceeding, a claim for damages for loss of future rent growing out of the breach of a simple covenant to pay rent as distinguished from a covenant to pay an amount to be determined as liquidated damages in a stipulated manner as in the *Filene* case. These cases read together completely dispose of the petitioners' primary argument that all claims for damages for loss of rent are provable in bankruptcy whether arising from breach of a simple covenant to pay rent, under covenants for payment of liquidated damages as in the *Filene* case or under contracts of indemnity, as in these cases. When the dictum in the *Filene* case is given that effect which it was obviously intended to have, we think the *Filene* case also disposes of any contention that while a claim for damages for future rent by reason of a breach of the simple covenant to pay rent would not be provable in bankruptcy under the reasoning of *Gardiner* v. *Butler,* a claim based upon such a provision as was found in the *Filene* case would be so provable. Otherwise there was no occasion for the court to distinguish between the rule in bankruptcy and the rule in equity.

Assuming, however, for the sake of argument that such is the effect of the *Filene* case, the obligation therein undertaken by the tenant was entirely different from the obligation undertaken by the tenants in the instant cases, as we shall point out in the next succeeding subdivision of this brief dealing with the status of claims arising under the particular clauses to be found in the leases now before the Court.

As hereinbefore stated, and as evidenced throughout their brief, the petitioners' major and fundamental contention is that claims for damages for loss of future rent are in no way distinguishable from claims for damages growing out of executory contracts relating to personalty and to the performance of personal services, and that no distinction *should be made* in respect thereof in the administration of the Bankruptcy Act. As demonstrated above, this contention cannot be sustained. It cannot be sustained because fundamentally claims for damages for loss of future rent are not recoverable against a solvent defaulting tenant, while claims for damages growing out of breaches of executory contracts relating to personalty and to the performance of personal services give rise to an immediate cause of action against the party at fault, if solvent.

The necessary result is that claims of the latter class are generally provable in bankruptcy, the exceptions thereto being exceptions to the general rule, and that, conversely, claims for damages for loss of future rent are not provable in bankruptcy, the exceptions, if any, being exceptions to the general rule.

These cases constitute no such exception.

III

THE SPECIFIC CLAIMS PRESENTED IN THESE CASES, ARISING OUT OF THE PARTICULAR COVENANTS CONTAINED IN THE LEASES BEFORE THE COURT, ARE IN NO EVENT PROVABLE IN BANKRUPTCY.

1. In the *Brown* Case, No. 506.

The covenant relied on in support of this claim is:

> "Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, *and upon entry as aforesaid this lease sh 'l determine, and the Lessee*

> *covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified"* (R. 7). [Italics ours.]

The covenant relied on was not a covenant for the payment of liquidated damages. Neither was it one giving rise to any liability or right of action whatsoever at the date of re-entry and termination. It was a covenant to indemnify against actual loss only. The loss against which the tenant agreed to indemnify the landlord was, in the words of the instrument itself,

> "all loss of rent which the lessor *may incur* by reason of such termination, *during the residue of the term*".

The words employed thus plainly limited the obligation of the tenant in the event of default, re-entry and termination to the payment only of such loss of rent as the landlord might suffer during the remainder of the term, until the conclusion of which it could not be determined whether there was a loss or, if so, its amount. It imposed no present liability and its provisions could not be breached unless at the end of the term it developed that there was an actual loss and the tenant refused to make good his covenant. Until the happening of these events, no liability whatsoever attached and no cause of action could arise.

It is well settled that, under a contract of indemnity against loss, no liability arises unless and until loss has actually been suffered by the indemnitee, that no cause of action arises until such actual loss has been suffered and

that hence no liability attaches and no action may be brought until after the expiration of the period necessary in respect of each particular case for the determination of the existence or absence of such loss. *Wicker* v. *Hoppock*, 6 Wall. 94; *Southern Surety Co.* v. *Sheldon*, 33 Fed. (2d) 289 (C. C. A. 9th); *O'Connor* v. *Aetna Life Insurance Co.*, 67 Neb. 122; *Trinity Church* v. *Higgins*, 48 N. Y. 532; *Henderson-Achert Lithographic Co.* v. *John Shillito Co.*, 64 Ohio St. 255; *Central Trust Co.* v. *Louisville Trust Co.*, 100 Fed. 545 (C. C. A. 6th).

The rule was thus stated by this Court in *Wicker* v. *Hoppock*, *supra*:

> "If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

The general rule stated above is equally applicable to contracts of indemnity for loss of rent. It was so held in *Hermitage Co.* v. *Levine*, 248 N. Y. 333, in an opinion by Mr. Justice Cardozo, then Chief Judge of the Court of Appeals New York. As the Court said in that case (p. 338):

> "* * * it may turn out in the end that there has been a gain and not a loss".

To the same effect are *Gardiner* v. *Parsons*, 224 Mass. 347; *Providence Bldg. Co.* v. *Atlantic National Bank et al.*, 228 Fed. 814 (D. C. R. I.); *Phillips-Hollman* v. *Peerless Stages, Inc.*, 210 Cal. 253.

Had the tenant in this case remained solvent and the lease been terminated for its default, it would have incurred no liability whatever at the date of the termination and re-entry or until the end of the term and then only if it appeared at that time that the landlord had suffered an actual loss. It follows of necessity that the covenant relied on gave rise to no liability upon the part of the Bankrupt by reason of re-entry and termination and hence to no claim subsisting at the date of bankruptcy even if such re-entry and termination be related back to such date.

Prior to the enactment of the Act of 1898, it had been held that a claim under a similar contract of indemnity was not provable in bankruptcy under the Act of 1867, although that Act permitted proof of contingent claims. *Ex parte Lake*, Fed. Cas. 7991 (1877). The first case which arose after the Act of 1898 involving such an indemnity covenant in a lease was the case of *In re Ells*, 98 Fed. 967 (D. C. Mass. 1900). In that case the Court said (p. 969):

> "What, then, would be the remedy of the landlord against the former tenant immediately after re-entry under the clause mentioned, had there been no bankruptcy of the tenant? Could the landlord have recovered at once the difference between the present letting value and the rent for the residue of the original term? I think not. The contract was one of indemnity for loss of rent and other payments, and would be broken

only after, and so far as, rent had been lost and payments had been made. Doubtless, the covenant might have been expressed otherwise. If the debtor in this case had made a contract to take a lease at a fixed rent, and had broken the contract by refusing to execute the lease, damages for the entire breach could have been recovered at once, and might perhaps have been estimated at the difference between the rent stipulated in the contract and the rental value of the premises. A covenant in a lease might be worded expressly to require the lessee, in case of re-entry, to pay at once damages calculated upon this basis. But the contract or covenant supposed is not the covenant in this case. The contracts sued upon in the cases cited in argument by counsel for the creditor—contracts to take water for a specified time, to employ the plaintiff, to furnish board or support, etc.—were not contracts of indemnity. Immediately after re-entry the lessor in this case, even if unhampered by bankruptcy, could not have brought suit on this covenant against the lessee to recover the damages for which he seeks to prove against the lessee's estate in bankruptcy."

To the same effect are *In re Roth & Appel,* 181 Fed. 667 (C. C. A. 2d, 1910); *In re Wise Shoes, Inc.,* 2 Fed. Supp. 521 (D. C. S. D. N. Y., 1932), aff'd 64 Fed. (2d) 1023; *In re Hubbard,* 57 Fed. (2d) 213 (D. C. W. D. N. Y., 1932); and *In re Bliss Auto Sales Co.,* 22 A. B. R. (N. S.) 44 (D. C. N. D. Ohio, 1932).

Another case in which the ground for decision was that the claimant could not have recovered at the date of the adjudication against a solvent indemnitor is *In re Merrill & Baker,* 186 Fed. 312 (C. C. A. 2d). In

that case the claimant had loaned money to a subsidiary corporation of the bankrupt upon collateral security. The bankrupt had guaranteed that in case the proceeds of the pledged collateral should be insufficient to pay the loan it would pay the amount of the deficiency. At the date of the bankruptcy of the parent corporation, the loan was unpaid and the collateral was still intact in the hands of the claimant. The District Court held that the contract was not one to pay the amount borrowed at all events but only to pay if and to the extent that the security for the loan was insufficient and that an action could not have been maintained against the bankrupt on the day of bankruptcy, saying (p. 315):

> "There was no certainty that anything ever would be due nor certainty as to what would be due if liability ever arose."

On appeal the Circuit Court of Appeals affirmed, on the decision of the District Judge.

As heretofore pointed out, the cases of *In re Ells* and *In re Roth & Appel* were both cited by this Court in the *Chicago Auditorium* case. The case of *In re Merrill & Baker* was cited in this Court's opinion in *Maynard* v. *Elliott* as exemplifying a claim which was not provable in bankruptcy.

In Point I of their brief, petitioners argue that the grounds of the decision in *In re Roth & Appel, supra* (the leading case in the Second Circuit which the court below followed in these cases) have been overruled by subsequent decisions of this Court. With this we disagree. It is true that in that case the court expressed the view that, reading the provisions of sub-division 1

into sub-division 4 of section 63, a debt to be provable must be absolutely owing at the date of the bankruptcy. While it may have been influenced by this view, its decision was not predicated thereon and, the court stated that this expression of its view was unnecessary for the decision. It is apparent that the court was following the decision of *In re Ells, supra,* to which it referred and from which it quoted. The court stated (p. 672):

> "In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equalled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant."

But if every reason advanced by the court in *In re Roth & Appel* for its decision were erroneous, the decision would still be correct, for, in that case, just as in the cases of *In re Ells* and *In re Merrill & Baker* and just as in the instant cases, the claimant would have had no claim on his indemnity covenant at the date of bankruptcy had his indemnitor remained solvent.*

Counsel for petitioners (brief, p. 42) erroneously treat the covenant of indemnity in these cases as the equivalent of the liquidated damage clause under which damages were allowed to be proved in equity in *William*

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*It should be noted that this rule has been applied to prevent the proof of a claim for damages for loss of future rent in an equity case. See the well reasoned opinion of Circuit Judge Mack in *Western Electric Co., Inc.* v. *Powers Accounting Machine Co.* (referred to in Referee's opinion in Case No. 506, R. 25-26). Judge Mack's opinion is quoted at length in the brief herein of Arthur A. Ballantine as *amicus curiae* (pp. 13-14).

Filene's Sons Co. v. *Weed, supra.* The distinction is, of course, plain. A contract to indemnify against actual loss gives rise to no liability, except in the event of such loss, and to no cause of action until the existence of an actual loss has been ascertained. A contract to pay liquidated damages is a contract to pay a fixed sum, or an amount to be ascertained under some formula provided by the parties in the contract, immediately upon the breach of some covenant contained in the contract. A contract of indemnity is in no way the legal equivalent of a contract for the payment of liquidated damages. To allow the present claims would be to apply to contracts of indemnity in leases a rule completely at variance with contracts of indemnity in other cases.

Moreover, the factual situation upon which the amount of the recovery in the two cases depends is wholly different. The agreement in the *Filene* case was to pay the difference between two presently ascertainable sums, *i.e.* the reserved rent and the estimated rental value of the premises for the remainder of the term *at the date of re-entry and termination.* The agreement under a contract of indemnity is to pay the actual loss suffered during the residue of the term, the existence or amount of which is not a presently ascertainable fact. Opinion evidence as to the present rental value of the premises for the remainder of the term at the date of re-entry and termination is obviously admissible under an agreement such as that made in the *Filene* case, and such opinion evidence will be based upon the then existing state of the rental market. Even if opinion evidence on which to base an estimate of the rent which the landlord will

receive in future years were admissible, it remains true that any such estimate is purely a matter of speculation and conjecture, and does not and cannot determine *the actual loss which the landlord may suffer during the residue of the term, to pay which is the only liability of the tenant under its indemnity covenant.*

This distinction is well illustrated by the case of *Gardiner* v. *Parsons, supra,* in which an assignment for creditors had been made by a tenant under a lease providing:

> "and the Lessee covenants that in case of such termination * * * it will indemnify the Lessor against all loss of rent and other payments which he may incur by reason of such termination during the residue of the time * * * specified for the duration of the said term; or at the election of the Lessor the Lessee will upon such termination pay to the Lessor as damages such a sum as at the time of such termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments herein named. * * *"

The Court said (p. 350):

> "The plaintiff however could not recover both indemnity and damages, but must elect the ground of liability on which he proposed to hold the lessee. * * * If indemnity is chosen, the lessee becomes liable for any loss resulting from a rental less than the rent reserved with other payments which the lessor may incur 'by reason of such termination during the residue' of the term. It is a liability contingent upon events thereafter occurring, because the full amount which the lessee

> eventually must pay for the remainder of the term cannot be wholly ascertained until the period ends. * * *
>
> If, however, the lessor elects to take damages, they are assessed as of the date of termination, and are measured by the difference between the rental value of the premises in the market for the remainder of the term 'and the rent and other payments herein named'."

It is said in petitioners' brief that the covenant of indemnity, like the covenant broken in the *Chicago Auditorium* case, was a personal covenant and as in that case affords a basis for a provable claim in bankruptcy. As we have already pointed out, the Court in that very case distinguished between covenants relating to personalty and to the performance of personal services and those growing out of the relation of landlord and tenant. There is, however, this further insurmountable distinction. The breach relied on in the *Chicago Auditorium* case had already occurred, giving rise, under the doctrine of anticipatory breach of contracts relating to personalty and to the performance of personal services, to an immediate right of action in damages. No breach of the covenant of indemnity had occurred or could occur until the end of the term, before which time no liability whatever attached and no cause of action arose, and then only in the event of actual loss. The doctrine of anticipatory breach is wholly inapplicable to a contract of indemnity as distinguished from a contract for continuing performance in respect of personalty or personal services, such as for the delivery of goods or performance of personal services over a period of time. *Roehm* v. *Horst,* 178 U. S.

1, 17, 18; *Moore* v. *Security Trust & Life Insurance Co.*, 168 Fed. 496 (C. C. A. 8th), cert. denied 219 U. S. 583. A contract of indemnity can be breached, if at all, but once and then only at the time when the indemnitor refuses to make the indemnitee good as against an actual loss.

2. In the *Manhattan Properties* Case, No. 505.

In the *Manhattan Properties* case, the tenant agreed, in the event of re-entry and re-letting by the landlord,

> "* * * to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; * * *"

and it was further provided,

> "* * * the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

As in the *Brown* case, there was no covenant for the payment of liquidated damages or of damages to be

ascertained in any manner at the date of re-entry. The obligation of the tenant was only to pay, as stated above, such deficit, if any, as should accrue from month to month during the residue of the term and only if and to the extent that there should be such a deficit would the tenant be under any liability.

It is therefore clear that, at the date of the petition, the landlord in the *Manhattan Properties* case would have had no cause of action against the tenant had bankruptcy not intervened, except for the current month's rent which has been allowed. *McCready* v. *Lindenborn*, 172 N. Y. 400; *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28.

The lease moreover contemplated that if the landlord should actually receive during the residue of the term an aggregate amount exceeding the reserved rent, the amount of the excess should be paid to the tenant at the end of the term. In other words, while providing for a possible liability on the part of the tenant in the event of actual loss by the landlord, it also provided for a possible liability upon the part of the landlord in the event of actual gain, a liability which the landlord could extinguish only by release of the tenant by notice in writing within the six months period provided for. The periodic payments to be made by the tenant in the event of loss from month to month therefore constituted interim payments only to be taken into account at the end of the term in determining the ultimate liability of either party which would be in no wise affected thereby.

If at the end of the term there should be an overplus in excess of the reserved rent, the mutual covenants contained in the lease would give rise to the creation of an asset rather than of a liability. If it is now competent

for the Court under the provisions of this lease to undertake to determine whether at the end of the term there will be a loss and, if so, how much, and to allow the same as a claim against the bankrupt estate, it is equally competent for the Court and equally its duty to determine by the same process of conjecture that there will be an ultimate gain and to permit a recovery against the landlord of the amount of such gain as a part of the assets of the estate. Either determination would equally involve conjecture and speculation. Neither is permissible either under the Bankruptcy Act or at common law. Just as under the ordinary contract of indemnity re-entry and termination would give rise to no present liability or cause of action against a defaulting solvent tenant so, under the peculiar provisions of this lease, no present cause of action in favor of the tenant and against the landlord under the overplus provision would arise and the existence or amount of his possible liability thereunder would not be ascertainable until the end of the term. Clearly the liabilities of either landlord or tenant under the covenant relied on and their present enforcement rest on the same foundation. Clearly neither is a presently existing or presently ascertainable liability and neither may be asserted or adjudicated in the bankruptcy proceedings.

3. Even though a claim for damages under breach of a simple covenant to pay rent should be held to be provable, claims arising under the leases here in question are not provable.

Petitioners invite this Court to overrule its decision in the case of *Gardiner* v. *Butler*, 245 U. S. 693. For the

reasons hereinbefore stated, we think it plain that that decision was correct and that a claim for damages for breach of a simple covenant to pay rent is not provable because re-entry and termination terminated all obligation of the tenant to pay without giving rise to any cause of action, even as against a solvent tenant, for damages for breach of such covenant.

Even if this Court should otherwise determine, however, the claims presented in these cases are not provable in bankruptcy. The parties in these cases by contract themselves provided the remedy for breach. By so providing, the landlord waived any claim which might have otherwise arisen through a breach of the covenant to pay rent itself and limited his right of recovery to actual loss sustained, if any. In neither lease is provision made for concurrently alternative remedies. The parties themselves fixed their respective rights and liabilities by contract and, for the reasons given above, no provable claim may arise under the covenants adopted by the parties as measuring their respective rights in the event of default.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENTS OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

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SUPREME COURT OF THE UNITED STATES OF AMERICA

MANHATTAN PROPERTIES, INC., Petitioner, *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of OLIVER A. OLSON CO., INC., bankrupt, Respondent.	No. 505.
SAMUEL R. BROWN, Petitioner, *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of UNITED CIGAR COMPANY OF AMERICA, bankrupt, Respondent.	No. 506.

BRIEF FOR NATIONAL ASSOCIATION OF CREDIT MEN, AS AMICUS CURIAE

W. RANDOLPH MONTGOMERY,
EDWIN M. OTTERBOURG,
CHARLES A. HOUSTON,
of New York City,
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SUPREME COURT OF THE UNITED STATES OF AMERICA

MANHATTAN PROPERTIES, INC., Petitioner, *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of OLIVER A. OLSON CO., INC., bankrupt, Respondent.	No. 505.
SAMUEL R. BROWN, Petitioner, *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of UNITED CIGAR COMPANY OF AMERICA, bankrupt, Respondent.	No. 506.

BRIEF FOR NATIONAL ASSOCIATION OF CREDIT MEN, AS AMICUS CURIAE.

Foreword.

The National Association of Credit Men has, by consent of counsel, been permitted to file this brief as *amicus curiae*.

This Association was organized in 1896 as a membership corporation, at which time no national bankruptcy law existed. The Association's first important activity was to advocate and aid the adoption of the Bankruptcy Act of 1898. It has today among its members all of the leading merchants, commercial corporations and banks of

the country, its membership enrollment being in excess of twenty thousand.

In almost every important bankruptcy proceeding, including the proceeding out of which this case arose, certain of its members are creditors for merchandise sold or money lent.

Because of these facts, the Association, on behalf of its members, is vitally interested in any decision in bankruptcy which lays down any general rule defining who shall be creditors and thus who shall be entitled to share in the assets of the bankrupt. For this reason, the National Association of Credit Men has seen fit to authorize the filing of this brief, in order that the court's attention may be specifically drawn to the effect of its decision in this case on the hitherto well-recognized rights of the extenders of commercial credit throughout the United States.

The question at issue with respect to the claims of landlords for future rent or damages in lieu thereof, has been most frequently discussed, either from the standpoint of the landlord, or from the standpoint of the tenant-debtor.

But in a bankruptcy proceeding, there are other parties, particularly creditors who have sold goods or lent money, and we shall discuss this case from the standpoint of such creditors, whose rights will be vitally affected, not only in this case, but in almost every bankruptcy proceeding now pending or hereafter instituted.

SUMMARY OF ARGUMENT.

POINT I.

Long established commercial distinctions between the claims of a landlord and the claims of other creditors should be respected, and this court should affirm the rulings for a long time followed in most of the circuits, and should disallow the landlord's claim.

POINT II.

This distinction between the landlord's claims and the claims of other creditors is founded, not only on commercial usage and necessity, but also on legal history.

POINT III.

Congress, in the Bankruptcy Act, intended to preserve this distinction and to bar the claims of landlords.

POINT IV.

Even if we disregard the peculiar nature of rent claims and treat this claim as one merely for damages for breach of contract, the claim is so contingent in character and extent as to be unprovable in bankruptcy in competition with the claims of other creditors whose debts are more fixed and certain.

POINT I.

Long established commercial distinctions between the claims of a landlord and the claims of other creditors should be respected, and this court should affirm the rulings for a long time followed in most of the circuits, and should disallow the landlord's claim.

Commercial law is largely the outgrowth of commercial usage and custom. From time immemorial, credit has been extended largely on faith in the debtor's financial position, shown by a statement of his assets and liabilities. In modern times, the custom has grown to demand from the merchant expecting credit a financial statement which lists with more or less particularity his assets and his liabilities. Almost every large extender of credit has in its employ a credit man whose duty it is to examine these statements, analyze them and evaluate the credit worth of the applicant.

Among the liabilities, there would appear accounts payable for merchandise sold or services rendered, bills payable for similar consideration or for money loaned, and other liabilities of like nature whose amount could be readily figured in dollars and cents and placed on one side of the balance sheet. The liability, if such it be, of an applicant for credit arising out of his duties as tenant under leases has heretofore never appeared among his liabilities on a financial statement and has never been calculated in any computation of his net worth for the purposes of credit. In fact, there is no way by which a credit man, even if he were informed of the existence of outstanding leases, could make any mathematical computation which would justify him in including a fixed and certain amount among the liabilities. If he were to include the total amount of the rent reserved for the balance of the term, the credit of most of the merchants in

the country would have to be seriously curtailed or completely denied and all that vast volume of the business of the country which is transacted on credit would be seriously affected.

The commercial customs of the country, as we shall hereafter point out in Point II, which make this sharp distinction between claims for future rent and other claims, have arisen because the courts and the legislatures have more or less consistently made the same distinction and have treated rent, or its equivalent, as something of a far different nature than a claim for goods sold and delivered or money loaned. The wisdom of the historical distinction may be theoretically arguable, but it has existed for centuries as a fact and that fact has strengthened the commercial usage; and reliance has been placed upon it by the extenders of credit. And no matter by what judicial process we may attempt to answer the question in this case, we cannot overlook the fact.

Under the present Bankruptcy Law, six out of nine of the Circuit Court of Appeals have ruled that the claims of landlords for future rent, or for damages for failure to pay future rent, cannot be proved in bankruptcy in competition with the claims of other creditors.

Slocum v. *Soliday,* 183 Fed. 410, 1st Circuit;
McDonnell v. *Woods,* 298 Fed. 434, 1st Circuit;
Matter of Roth & Appel, 181 Fed. 667, 2nd Circuit;
Trust Co. of Ga. v. *Whitehall Holding Co.,* 53 Fed. (2nd) 635, 5th Circuit;
Atkins v. *Wilcox,* 105 Fed. 595, 5th Circuit;
Wells v. *Twenty-first St. Realty Co.,* 12 Fed. (2nd) 237, 6th Circuit;
Britton v. *Western Iowa Co.,* 9 Fed. (2nd) 488, 8th Circuit;
Watson v. *Merrill,* 136 Fed. 359, 8th Circuit;
Colman Co. v. *Withoft,* 195 Fed. 250, 9th Circuit.

The leading case is undoubtedly *Matter of Roth & Appel, supra*, decided in 1910 by the Circuit Court of Appeals for the Second Circuit.

The lease in *Matter of Roth & Appel*, contained the following provision:

> "In case the lessee is declared bankrupt the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry."

If *Matter of Roth & Appel* is not to be expressly overruled by this court, its holding compels a determination of this case against the contentions of the landlord and in favor of the contentions of the general creditors.

For more than twenty-three years, that case has been followed extensively in seven out of nine circuits. In 1913, the Supreme Court cited *Matter of Roth & Appel* in a case which limited provable debts founded upon an open account or upon a contract, express or implied, so as to include only such as existed at the time of the filing of the petition in bankruptcy.

Zevalo v. *Reeves*, 227 U. S. 625.

In only two circuits out of nine has there been a decision against the holding of *Matter of Roth & Appel.*

In re Keith-Gara Co., 203 Fed. 585, affirmed 213 Fed. 450, 3rd Circuit;
In re Chakos, 24 Fed. (2nd) 482, 7th Circuit.

The cases in the third circuit which allow the landlord's claim for future rent for damages arise, for the most part, in Pennsylvania, where statute for a long time has given to the landlord a lien on the assets of the tenant, not only for past due rent, but for rent which may accrue to a certain extent. The statute is one of long standing and was noted by this court in the case of *Longstreth* v. *Pennock,* 87 U. S. (20 Wall) 575.

But even in Pennsylvania, the landlord's lien and the landlord's claim would not survive re-possession by the landlord. As the court said in the matter of *Keith-Gara Co., supra*:

> "Of course, if a landlord retakes possession of the property, his right to claim priority can no longer be enforced."

In other words, the landlord cannot have both the rent, or its equivalent, and the use of the premises.

So firmly fixed is this rule in Pennsylvania that the Circuit Court of Appeals for the Third Circuit has decided that where a landlord asserts his claim for future rent under a lease, he cannot, at the same time, take to himself rentals from sub-tenants, nor can he even use these rentals from sub-tenants as a credit or offset against the main lease liability, but he must first turn such collections over to the trustee and then prove his claim as a general creditor.

Rosenblum v. *Uber,* 250 Fed. 584.

In short, even in Pennsylvania, a landlord cannot have both the premises and a claim against the bankrupt for future rent. The cases in that third circuit, if it were not for the peculiar Pennsylvania statute, could easily have been decided in accordance with *Matter of Roth & Appel.*

The leading case in the seventh circuit which holds contrary to the doctrine of *Matter of Roth & Appel* is *In re Chakos, supra.* In that case, there was no discussion in the opinion, nor were any authorities cited, and there was no specific reference to *Matter of Roth & Appel.* The court contented itself with a statement that the landlord's claim for damages on the future rent should be allowed as a general claim "if and when liquidated". As to whether or not this claim of the landlord could be liquidated, the court says nothing.

It is not necessary at this point for us to argue the justice of the ruling in the case of *Roth & Appel;* it is sufficient for us to point out that it has been extensively followed in the courts and, of course, by the business community. Whatever the landlords may have thought or now think concerning the validity of the reasons which underlie that decision, they have been, for a long period of time, bound by this holding and it is to be assumed that they have shaped their course in accordance with that chart and have taken measures to protect themselves by closer scrutiny of the tenant's financial position and antecedents, by way of security in the form of deposit or bond, and in other ways. The creditmen likewise have for twenty-three years been aware of that decision and its controlling effect and, on their part, they had extended credits on the faith of that decision and in their computation of the net worth of the applicant for credit, they have justifiable disregarded the uncertain and contingent liability to the landlord.

Such a situation of reliance on a decided case should not be disturbed by this court merely because it may disagree with the reasons underlying the decision and, certainly not where there is no proof or suggestion of any material change in business conditions or the methods of doing business.

While this court may not be bound by the principle of *stare decisis,* particularly where the decision is one of

an inferior court, nevertheless, the strong and reasonable motive which impels courts to abide by the rule decided is here present with full force and effect.

It may reasonably be assumed that property rights of considerable amount have been acquired on the faith of that decision, of which both landlords and other creditors have been well aware for more than twenty-three years. If the case were one of recent origin, there would be no force to this point, but time has given to the decision an authority which cannot lightly be disturbed. The rules of commerce must be fixed and certain and, while courts and legislatures and the merchants themselves will strive to make these rules perfect, it is more important that the rules be permanent, rather than perfect. Business can be done with a faulty set of rules; business cannot be done with a constantly changing set of rules.

As this court said, in following long established decisions of the Circuit Court, in another particular:

> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance."
>
> *Maynard* v. *Elliott*, 283 U. S. 273.

POINT II.

This distinction between the landlord's claims and claims of other creditors is founded, not only on commercial usage and necessity, but also on legal history.

Time and again the courts have pointed to the historical distinction between "rent" and other debts. Justice HOLMES adverts to it in *Gardiner* v. *William S. Butler & Co.*, 245 U. S. 603, as follows:

"But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition, and we believe that it is the general understanding in that state that, in the absence of statute or express contract, a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee."

Rent issues out of the land and, in effect, it is some return to the landlord of the profits of the land which he has leased. When the landlord retakes his property, he receives back the whole of it, and at the same time, the tenant becomes unable to reap any profit out of it, and hence unable to pay a "rent" thereon.

Bosler v. *Kuhn,* 8 W. & S. 183 (Pa.).

No matter how archaic these conceptions of rent may be, they have left their impression on our judges and legislators, and on the layman, who can see no other definition than this: rent is paid for the use of land.

At all events, the use of the land is the consideration for which rent is paid.

Fifth Avenue Building Co. v. *Kernochan,* 221 N. Y. 370.

When the landlord repossesses himself of the land, the fixed and certain obligation to pay rent ceases.

Gardiner v. *William S. Butler & Co.,* 245 U. S. 603.

From that time on, the tenant ceases to receive value, and the landlord ceases to contribute towards the tenant's estate or assets.

Other creditors had added their merchandise or money to the common fund, which on bankruptcy will be shared

among them. So has the landlord, insofar as he has given possession or use of his land, but, after he has evicted the tenant, he no longer is contributing value to the common fund, and there is small wonder that the commercial creditors should look askance at any claim of the landlord for the equivalent of future rent.

Such claims can only arise by statute or by express contract.

By contract, the tenant may agree to remain liable for any deficit between rent reserved and rent actually received, and such contracts, as between the parties, will be enforced, although even here, there is an understandable reluctance on the part of the courts to recognize any such claim after the landlord has re-entered.

Michaels v. *Fishel,* 169 N. Y. 381.

In that case, the New York Court of Appeals said:

> "While it was within their power to agree that the lessee should continue to pay rent after the premises had been taken away from him owing to his default, still a covenant to pay, with no right to enjoy, should be clear and unambiguous as to the event which calls it into action, for, as was said by an old writer, 'a tenant can make no return for a thing he has not'" (7 Bacon's Abr. [7th Ed.] 57).

Even more reluctance is manifest when the landlord urges such a claim, not against the tenant, but against assets, in competition with creditors who have contributed thereto.

Kothe v. *R. C. Taylor Trust,* 280 U. S. 224.

In that case, the lease provided that the filing of a petition in bankruptcy should be a breach of the lease, and the landlord should be entitled to recover damages

for such breach in an amount equal to the amount of the rent reserved for the residue of the term. The court held that the clause must be construed as a penalty and unenforcible, and said:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate * * * not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably that would affect only those entitled to share in the proceeds of property beyond his control.
>
> The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor."

Disfavor must arise in any case where the assumed creditor has not contributed consideration of value to increase the bankrupt estate, and nevertheless, insists upon receiving a share of it.

The claim of a landlord for damages, in lieu of rent, after he has retaken the property, is such a claim. He is not in the same position as other creditors, who have parted with value, and it is unjust to permit him to share in the estate which their contributions have created.

POINT III.

Congress, in the Bankruptcy Act, intended to preserve this distinction and to bar the claims of landlords.

The claim of a landlord for damages, in lieu of rents, after re-entry, is *sui generis*, as we have seen, partly for historical reasons and partly from its fundamental injustice.

Nevertheless, Congress might have included such claims among those provable in bankruptcy, but we shall argue that Congress has not seen fit so to do, in the Act of 1898.

Section 63 of the present Act contains no express reference to such claims. Support for their allowance can be found only in the general statement that:

> "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account or upon a contract express or implied."

To this must be added the qualification that the debt, claim or demand, to be provable, must be in existence at the time of the bankruptcy.

Zavalo v. *Reeves*, 227 U. S. 625.

Did Congress intend to include, in its general language, claims contingent not only in amount but likewise in their very essence? These landlord's claims are such doubly contingent claims.

It was assumed by the Circuit Court of Appeals in this case that the Supreme Court has definitely ruled that under the language of Sec. 63 (a) (4), certain contingent claims were provable.

Maynard v. *Elliott*, 283 U. S. 273;
Central Trust Co. v. *Chicago Auditorium*, 240 U. S. 581.

But not all contingent claims are provable.

Dunbar v. *Dunbar*, 190 U. S. 340.

We shall discuss these cases at greater length in our Point IV; suffice it to say here that none of those cases arises out of the relationship of landlord and tenant.

That relationship is so peculiar and has been so from time immemorial, that it might and should receive express treatment in any bankruptcy act. Its omission in this Act is significant of Congressional intent not to include it.

The Act of 1867 expressly refers to rents:

> "Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."
>
> *Sec. 19*, Bankruptcy Act of 1867.

The same Section 19 said further:

> "No debts other than those above specified shall be proved or allowed against the estate."

The Act of 1841 did not mention landlords, as creditors, although it listed various holders of contingent claims

> "whose debts are not due and payable until a future day; all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt."
>
> *Sec. 5*, Bankruptcy Act of 1841.

With that Act in mind, Congress, in the 1867 Act, enlarged the list by adding landlords, to a certain extent.

In the Act of 1800, Sec. 39, provision was made for the allowance of claims payable at future days, as if they were payable presently, and also for the allowance of certain contingent claims, on bottomry and respondentia

bonds and policies of insurance, after the contingency or loss has occurred.

The action of Congress in thus ignoring the contingent claims of landlords should be compared with the action of the British Parliament during the same period, merely as an example of what a legislature would do, if the landlord were to be included.

See

Columbia Law Review, Vol. XXXIII, No. 2, February, 1933.

In England, in the statute of 1883, 46 and 47 Vict., Chapter 52, Parliament, in Section 37, used the most general and all inclusive language in permitting proof of "all debts and liabilities, present or future, certain or contingent" and, further, in the same statute, Section 37, Sudivision 8, liability was thus defined:

> "'Liability' shall, for the purpose of this act, include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

Nevertheless, and in spite of this seemingly all inclusive language, Parliament deemed it necessary to provide

expressly for the allowance of the claim of a landlord in those cases where the trustee disclaimed the lease. After providing for the process of disclaimer, with particular reference to leases, Parliament said:

> "(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt in the bankruptcy."

Our Congress has never seen fit so to do and the landlords are, therefore, forced to find in the most general language support for their most special and peculiar claims.

Nor can it be argued that Congress was of the opinion, that its definition of provable debts in Sec. 63 of the Act of 1898 included the claims of landlords for future rent, and therefore, did not expressly say so.

In 1933, Congress amended the Bankruptcy Act (March 3, 1933, Chapter 204, 47 Stat.), and added provisions for composition and extensions by debtors, not bankrupt, on notice to creditors.

In the Amendment of 1933, Congress defined creditors, for the purposes of an extension, but not for the purpose of a composition, as follows:

> "The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title. A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63 (b) of this title."

And the term "debt" was thus defined:

> "The term 'debt' *for the purposes of an extension* proposal under this section shall include all claims

of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title." (Italics ours.)

The distinctions between an extension and a composition are clear; the extension implies continuance in business, continuance of liability and no discharge; composition implies a discharge on payment of some fixed or agreed consideration. In the extension proceedings, landlords are mentioned and provision is made for their claims, because presumably the debtor retains possession of the premises and is not discharged from his debts. In the composition proceeding, the landlord is not mentioned, because composition implies discharge, and Congress knew that landlords' claims were not dischargeable in bankruptcy and hence not provable.

Now, if the Act of 1898, as it then stood, was intended by Congress to include as provable debts the claims of landlords for future rents, there would be no necessity to make special mention thereof in the amendment. Here was a frank admission, not only of the peculiar nature of landlords' claims, but also of their hitherto unprovable character.

The claim of a landlord for future rent, or damages, is peculiar in nature and history. Such claims are not favored by the law, even between the parties. In bankruptcy, where the rights of other creditors supervene, such claims are even less favored. Congress did not include them expressly, and the amendment of 1933 establishes the Congressional intent to exclude them from the ordinary bankruptcy proceedings.

For over twenty-three years, courts generally had followed the rule of *Matter of Roth & Appel, supra*, and Congress had not seen fit to amend the law in that respect.

If a change were to be made, such change should come from Congress which would have power to establish at the same time a uniform system for the treatment of landlords' claims, in the same way as the English Parliament had done. Credits which have been extended on the faith of the unprovability of landlords' claims would not be disturbed; future credits would be regulated and extended in accordance with Congressional action.

POINT IV.

Even if we disregard the peculiar nature of rent claims and treat these claims as merely for damages for breach of contract, the claims are so contingent in character and extent as to be unprovable in bankruptcy in competition with the claims of other creditors whose debts are fixed and certain.

Disregarding history and commercial usage and adopting, for the sake of the argument, a construction of the Act of 1898, which would treat a landlord's claim for future rent as no different than the claim of a merchandise or other contract creditor, we shall here contend that these claims fall under the ban of those contingent claims which are not or should not be provable.

The rulings of this court in *Maynard* v. *Elliott,* 283 U. S. 273; *Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549 and *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, hereinafter discussed, are not inconsistent with the proposition that under the existing Bankruptcy Law, certain contingent claims are not provable.

In *Dunbar* v. *Dunbar,* 190 U. S. 340, the bankrupt had agreed to pay to his wife, for her support, certain sums until she should remarry. The husband had obtained his discharge and when sued by his wife upon the agreement for instalments falling due thereafter, he interposed

the discharge as a defense. If the claim were provable, it was likewise dischargeable.

This court pointed to the provision of the contract by which payments would cease in case the wife remarried, and held that the claim could not have been proved in bankruptcy "because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood."

In reaching that conclusion, the court relied on a decision under the Act of 1841, and said:

> "Mr. Justice Bradley, in *Riggin* v. *Magwire,* 15 Wall. 49, speaking for the court, said, that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the Bankruptcy Act of 1841. The fifth section of that act gave the right to prove 'uncertain and contingent demands' but it was held that a contract such as above described was not within that section."

Likewise, in the case of a landlord's claim to recover the deficiency between rent reserved and rent actually received, it is by no means certain that an actual duty or liability will arise under the contract.

When is there a deficit? Under some forms of leases, there is no deficit and hence no liability until the very end of the term. *Hermitage Co.* v. *Levine,* 248 N. Y. 335. We quote from that case:

> "The question is still left, how often and when shall the damage be computed? Is there to be a single cause of action in which all the damage will be computed down to October, 1945, or are there to be monthly causes of action to recover successive deficits, though conceivably new leases made when the present ones are over will make the net result a surplus?

No doubt, a damage clause can be drawn in such a way as to make a tenant responsible for monthly deficits after the re-entry of his landlord, and this without charging the landlord with a duty to account for a surplus in other seasons. Such a clause will be found in McCready v. Lindenborn (172 N. Y. 400), where the lease was to the effect that the tenant would pay the difference in rent 'in equal monthly payments as the amount of such difference shall from time to time be ascertained'. A clause similar in effect, though more uncertain in its terms, will be found in Mann v. Munch Brewery (225 N. Y. 189), where the tenant was to 'continue liable for the payment of the rent and the performance of all the other conditions herein contained'. None the less, in the absence of a provision that points with reasonable clearness to a different construction, a liability for damages resulting from a reletting is single and entire, not multiple and several. The deficiency is to be ascertained when the term is at an end (Harding v. Austin, 93 App. Div. 564 [per Willard Bartlett, J.]; Halpern v. Manhattan Ave. Theatre Corp., 173 App. Div. 610; 220 N. Y. 655; Darmstadt v. Knickerbocker C. & E. S. Co., 104 Misc. Rep. 547, App. Term, per Lehman J.; 188 App. Div. 129). The tenant when ejected ceases to be a tenant. What he covenants to pay is the damage, not the rent. To hold him for monthly deficits is to charge him with the obligations of a tenant without any of the privileges. He must pay in the lean months, without recouping in the fat ones. He must do this, though it may turn out in the end that there has been a gain and not a loss. A liability so heavy may not rest upon uncertain inference."

In other forms, the liability for a deficit might arise month by month. *McCready* v. *Lindenborn,* 172 N. Y. 400.

But, who is to say how long this liability continues, dependent as it is upon the continuance of the monthly deficit?

Each month's experience would furnish the basis for a separate liability and no one could forecast, even approximately, when the liability, if ever, would arise or how long the condition would exist.

Whether or not a duty or liability will ever arise depends upon many contingencies, not predictable and altogether uncertain in their nature.

The premises must continue in existence, despite the risk of fire, earthquake and flood, for the destruction of the premises would release the lessee, under prevailing statutes and usually by contract, and the existence of a rentable subject matter must be preserved as a condition of any liability. When, if ever, will the fire happen? As the court, in *Dunbar* v. *Dunbar, supra,* could not predict when, if ever, the wife would remarry, so here we must admit our inability to forecast the future life of the premises.

The building or land may be taken by the Government, under its power of eminent domain. The landlord, thereby, loses his title and right to possession of the property, and necessarily the power to relet. The liability of the tenant to pay a future deficit never arises.

The landlord may likewise lose his title by foreclosure of mortgage, and that contingency would apply to future as well as present mortgages.

In any of these instances, liability never attaches, after the landlord is deprived of his rentable building, and when that event shall happen, no man can tell. Calculation will not help to avoid the uncertainty.

Computation of future rental value must always, at best, be qualified and conditioned upon the *future* existence of the premises, in their present or demised condition, and any honest expert must so qualify his opinion.

Even were he to disregard the uncertainty of the future of the building, he would be still beset with other unpredictable conditions, such as, the general rental

market depending on general good times or bad, and the possible changes in that particular neighborhood which might make it a better or worse location.

Present rental value can be proven with reasonable certainty, but we are here concerned with *future* rental value, as to which we can have nothing better than a guess.

A claim, founded as to liability and as to amount, on guesswork, should not compete, in the distribution of bankrupt estates, with claims founded on certainties. The merchandise creditor is not permitted to speculate upon the quantity of goods he delivered, nor may the banker draw on his imagination as to the amount of money lent, or the fact of the loan.

The spirit of the Bankruptcy Act conserves the assets for distribution among creditors who are such upon a fair and adequate consideration. Their dividends should not be reduced by the allowance of landlords' claims, uncertain as to liability and unascertainable in amount.

This court has not held in any of its decided cases that a claim was provable in bankruptcy where *both* the liability was uncertain and the amount unascertainable. In the decided cases which we are called upon to distinguish, there was no speculation as to the existence of a liability, present or future. Where this certainty of liability existed, a somewhat speculative measurement of damage has been permitted in some cases. The type of cases we refer to are:

Williams v. *U. S. Fidelity Co.*, 236 U. S. 549.

(Obligation of principal to indemnify his surety, on a joint bond, given to insure performance of a building contract.)

Central Trust Co. v. *Chicago Auditorium*, 240 U. S. 581.

(Contract to furnish livery and other services for a hotel.)

Maynard v. *Elliott,* 283 U. S. 273.

(Obligation of indorser on promissory note.)

Schultz v. *Guthrie,* 235 Fed. 907.

(Contract of personal employment.)

In re Portage Rubber Co., 296 Fed. 289.

(Contract for sale of goods.)

None of these were cases of landlord and tenant.

The difference between the relationship of landlord and tenant and the other contract relationships has been used by this court and others as one broad ground for distinction. In *Central Trust Company* v. *Chicago Auditorium, supra,* this court indicated that the provability of the claim therein might be contrary to the rule of *In re Roth & Appel, supra,* and said:

> "Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the mere personalty.' Co. Litt. 292, b, Sec. 513."

In the *Portage Rubber Co.* matter *supra,* the Circuit Court of Appeals in the Sixth Circuit, observes the same distinction, and remarks that cases in the law of real property are outside the provision (Sec. 63 [a] 4).

Disregarding this historical distinction, there are certain essential differences between claims of the kind allowed and the landlord's claim.

In *Williams* v. *U. S. Fidelity Co., supra,* the bankrupt had contracted to build a school house and the U. S. Fidelity Company had given its bond to assure completion. The bankrupt agreed expressly to indemnify the fidelity company against any loss on its bond. A default occurred on November 9, 1900, and the School

Board took possession and completed the contract on April 13, 1901, and on May 14, 1901, demanded of the surety and principals, the payment of the loss. Thereafter, the contractor went into bankruptcy on May 28, 1901.

The liability was fixed and certain in amount; the obligation to reimburse the surety company was perfect, except for one condition only, payment by the surety company of the amount of the loss. That condition was solely within the control of the surety company. Furthermore, the debt could have been proved by the surety under General Orders 21-4. This court held there was no uncertainty.

But the conditions upon which a bankrupt tenant may become liable to his landlord for a deficiency in future rents are by no means within the control of the landlord, as we have seen. These conditions may be affected by natural causes, such as fire, governmental action, and general future business or market conditions. The cases are utterly different.

In *Central Trust Company* v. *Chicago Auditorium, supra,* the bankrupt had been granted the baggage and livery privileges of the Auditorium Hotel, for a term of five years. For the baggage privilege, he agreed to pay the sum of $6,000 and for the livery privilege, the sum of $15,000. Both of these payments were to be made in monthly instalments.

When bankruptcy occurred, the hotel company filed a claim for unliquidated damages caused by the breach. This court held that the bankruptcy of the licensee did constitute an anticipatory breach of the contract, and there was a provable claim under Section 63 (a) 4, and the damages may be liquidated under Section 63 (b).

But in that case, there was a fixed and certain liability of the bankrupt to pay $6,000 for the entire baggage privilege, and $15,000 for the entire livery privi-

lege, which liability would most certainly mature month by month and fall due. The liability arose when the contract was signed, and not month by month as the instalments matured. It was an executory contract and thus differed from the historical conception of a lease as this court took pains to note, as above referred to.

In *Maynard* v. *Elliott, supra,* the bankrupt was liable as an indorser of promissory notes, maturing after bankruptcy. Liability existed from the day the bankrupt indorsed the notes, but there was annexed to his liability, two conditions: (1) that the maker would not pay on maturity, and (2) that necessary steps would be taken by the holder to charge the indorser. The latter contingency was solely within the control of the holder and there could be little or no uncertainty as to that. The former contingency related to the solvency of the maker and although Justice STONE does not refer to the fact in his opinion, it appears from the record that the maker was "hopelessly and wholly insolvent at the time the petitions in bankruptcy were filed." (Agreed statement of Record on Appeal in Petition for Certiorari in *Rutherford* case, Para. 15, p. 6.)

In the record on appeal in the Circuit Court of Appeals (40 Fed. [2nd] 17), there appears a stipulation as follows:

> "(7) A stipulation was filed agreeing that at the time the petitions were filed and continuously to that time the payor and payee of the note were wholly insolvent and both had been discharged in bankruptcy." (Page 6 of Agreed Statement of Record on Appeal in *John V. Varney* appeal.)

There was, therefore, no doubt, legal or otherwise, as to the insolvency of the maker or his inability to pay.

In *Schultz* v. *Guthrie, supra,* the District Court of Massachusetts allowed the claim of an employee for damages for breach of the contract of employment. The

breach in that case was the filing of the petition. It appears that before allowance of the claim, the employee had secured other employment and he was allowed to prove, as damages, an amount equal to his wages for the actual period of unemployment. Such damages have been universally allowed in actions at law on such executory contracts and in that particular case, they were readily ascertainable. In cases like these, the damages are presumptively the amount of wages for the balance of the term of the contract, subject only to reduction or defense because of claimant's duty to minimize same. No such principles apply to the case of landlord and tenant.

In the *Matter of Portage Rubber Company, supra,* the claimant had sold rubber to the bankrupt, to be delivered in May and June, 1921. Only part of the rubber was delivered, when, on May 31, 1921, a petition in bankruptcy was filed against the buyer. The court regarded bankruptcy as an anticipatory breach, and allowed a claim for damages, in an amount equal to the difference between market value and contract price, at the time of bankruptcy. Here again, liability was fixed and certain in quality, and could be readily ascertainable as to quantity.

To extend the dates of delivery further into the future, in the *Portage Rubber Company* case, or to extend the duration of the contract for personal services, in the *Schultz* v. *Guthrie* case, does not vary the quality of the bankrupt's liability but naturally may make any ascertainment of its quantity more difficult. Even in these cases, a limit may be reached beyond which all is guesswork and conjecture. The claim might not be capable of liquidation, and hence, in a special case, not provable.

But in all these cases, liability was clear and certain, and of a kind well-recognized in our law; the amount only was uncertain.

In the case of a landlord, two doubts must first be resolved before a claim could be proved.

1. Is there, or will there ever be, any liability at all of the tenant to his lessor, and
2. Can we forecast the extent of that liability?

Both doubts can be resolved only by vague speculation as to the future.

These claims do not rise to the dignity of debts (demands or claims) provable under a bankruptcy statute which seeks a division of assets among creditors who are such for a fair consideration.

The cases of *Wm. Filene's Sons. Co.* v. *Weed*, 245 U. S. 597 and *Gardiner* v. *William S. Butler & Co., Inc.*, 245 U. S. 603, do not militate against our contentions, but rather support them.

Both those cases arose out of the equity receivership suit against Wm. S. Butler & Co., Inc., and were not proceedings in bankruptcy.

In the *Filene* case, *supra*, the landlord made claim for damages amounting to the difference between rental value and the rent and other payments reserved, less the deduction of so much of the per annum payments of $20,000 as may have been made. The lease expressly provided for such damages in case of a receivership. In allowing the claim, this court itself distinguished the case from a statutory bankruptcy and said:

> "We perceive no ground that would justify the rejection of the petitioner's proof for the whole sum subject to the discount agreed. Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only question for the Courts is what the statutes prescribe. But when the Courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts

except from the Court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 740, 741, 117 C. C. A. 503."

In the *Gardiner* case, *supra*, there were two claims filed, with respect to two separate leases. In the first claim, the lease was similar to that in the *Filene* case and for similar reasons the claim was allowed. In the second claim, the lease contained no such covenant of indemnity, and this court disallowed the claim and refused to follow the analogy of general mercantile contracts.

Considering both those cases together, so far as they may apply to a bankruptcy, the *dictum* is strongly to the effect that in bankruptcy, because of its statutory limitations on provable debts and because of the reciprocal provisions for discharging debts, such claims would not be allowed. In the equity proceedings, there is no limitation against proof of debts arising after suit filed, and consistent therewith, the holder of a claim thereafter arising is barred from independent action on his claim. The element of contingency as to date of accrual of liability plays no part in the equity proceedings. In bankruptcy, however, debts arising after bankruptcy are neither provable or dischargeable, and may be enforced after bankruptcy.

In bankruptcy, the claims of landlords, such as these, must be disallowed as contingent in quality and quantity, beyond hope of liquidation by calculation. Such

claims survive undischarged, and the claimants may secure payment out of future assets, when, if ever, the liability becomes fixed; they may not secure payment out of present assets, in competition with those creditors whose claims are presently fixed, and who may not be paid out of future assets.

Conclusion.

The fund to be distributed among creditors, consisting of the bankrupt's assets on the date of bankruptcy, should not be invaded by those who are not, at that time, among the group whose claims are present claims, whenever payable. Such is not the case of the landlord, who, for aught that appears, may never hold any claim.

Congress intended to exclude landlords' claims of the kind under discussion from the statutory bankruptcy scheme.

Finally, such claims are founded, if at all, on guess and speculation and are so contingent in quantity and quality as to make it grossly unjust to permit the landlords to share with those creditors whose claims are certain or fairly ascertainable.

On behalf of the large commercial interests of the country which have extended and are extending credits on the faith of the rules as they are and have been for many years, we ask that this court refuse to change the rules, and that the order of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes Cited.

BANKRUPTCY ACT OF 1898

30 Stat. 562 (1898)

Section 63:

"DEBTS WHICH MAY BE PROVED.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

BANKRUPTCY ACT OF 1867

14 Stat. 517

Section 19:

"And be it further enacted, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt.

All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to

stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods, or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

No debts other than those above specified shall be proved or allowed against the estate."

BANKRUPTCY ACT OF 1841

5 Stat. 440, 444

Section 5:

"And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the

laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuities and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in praesenti; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who

may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives."

BANKRUPTCY ACT OF 1800

Section 39:

"And be it further enacted, That every person who shall have bona fide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning."

ENGLISH BANKRUPTCY ACT OF 1883

46 and 47 Vict. Chapt. 52

Section 37:

"(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract,

promise, or breach of trust, shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court.

(6) If, in the opinion of the court, the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this act, be deemed to be a debt not provable in bankruptcy.

(7) If, in the opinion of the court, the value of the debt or liability is capable of being fairly established, the court may direct the value to be assessed, before the court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8) 'Liability' shall, for the purposes of this act, include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or under-

taking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."

Section 55:

"(1) Where any part of the property of a bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavored to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee of all personal liability in respect to the property disclaimed as from the date when the property vested in him, but shall not, except so far as necessary for the purposes of re-

leasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3) The trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notice to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures tenants' improvements, and other matters arising out of the bankruptcy as the court thinks just. * * *

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury and may accordingly prove the same as a debt in the bankruptcy."

AMENDMENTS OF 1933

47 Stat., Chapt. 204

Section 73:

"Additional jurisdiction. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 202, 203, and 205 of this chapter. (July 1, 1898, c. 541, s. 73, as added Mar. 3, 1933, c. 204, s. 1, 47 Stat.)"

Section 74:

"Compositions and extensions. (a) Any person excepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by section 41 (b) of this title, accompanied in either case, unless further time is granted, by his schedules, stating that he is

insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor'. The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title. A claim for future rent shall constitute a provable debt and shall be liquidated under section 63 of this title.

(b) After the filing of such petition or answer the court may upon reasonable notice to creditors and attorneys of record appoint a custodian or receiver, who shall inventory the debtor's estate and exercise such supervision and control over the conduct of the debtor's business as the creditors at any meeting or the court shall direct.

(c) The custodian or receiver, or if none has been appointed, the court, shall promptly call the first meeting of creditors, stating in the notice that the debtor proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the debtor's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and the fifteen largest unsecured creditors, with the amounts owing to each as shown by the schedules. Any creditor may appear at or before the first meeting and controvert the facts alleged in the petition. In such case the court shall determine as soon as may be the issues presented, without the intervention of a jury, and unless the material allegations are sustained by the proofs shall dismiss the petition.

(d) At the first meeting (1) the debtor may be examined; (2) the creditors may nominate a trustee, who shall thereafter be appointed by the court in case it becomes necessary to liquidate the estate as provided in subdivision (1) of this section; and (3) the court shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made. The court may later extend such time for cause shown, and may require, as a condition of such extension, additional terms for the protection of and indemnity against loss by the estate as may be proper.

(e) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims if unsecured have been allowed, or if secured are proposed to be affected by an extension proposal, which number must represent a majority in amount of such claims; and the money or security necessary to pay all debts which have priority unless waived and the costs of the proceedings, and in case of a composition the consideration to be paid by the debtor to his creditors, have been deposited in such place as shall be designated by and subject to the order of the court.

(f) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal, and such objections as may be made to its confirmation.

(g) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; (2) it is for the best interests of all creditors; (3) that the debtor has not been guilty of any of the acts, or failed to perform any of the duties, which would be a ground for denying his discharge; and (4) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In application for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

(h) The terms of an extension proposal may extend the time of payment of either or both unsecured debts and secured debts the security for which is in the actual or constructive possession of the debtor or of the custodian or receiver, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the debtor during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control over the debtor's business or affairs during such period by a creditors' committee or otherwise, and for the termination of such period under certain specified conditions: *Provided,* That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24, of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

(i) Upon its confirmation an extension proposal shall be binding upon the debtor and his unsecured and secured creditors affected thereby: *Provided, however*, That such extension or composition shall not reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.

(j) Upon the confirmation of a composition the consideration shall be distributed as the court shall direct, and the case dismissed: *Provided*, That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the debtor and his property during the period of the extension in order to protect and preserve the estate and enforce the terms of the extension proposal.

(k) The judge may, upon the application of the parties in interest, filed at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

(l) If (1) the debtor shall fail to comply with any of the terms required of him for the protection of and indemnity against loss by the estate; or (2) the debtor has failed to make the required deposit in case of a composition; or (3) the debtor's proposal has not been accepted by the creditors; or (4) confirmation has been denied; or (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal when the court has retained jurisdiction of

the debtor or his property, the court may appoint the trustee nominated by the creditors at the first meeting, and if the creditors shall have failed to so nominate, may appoint any other qualified person as trustee to liquidate the estate. The court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or if the confirmation of his proposal has been denied. No order of liquidation or adjudication shall be entered in any proceeding under this section instituted by or against a wage earner or a person engaged chiefly in farming or the tillage of the soil unless the wage earner or a person engaged chiefly in farming or the tillage of the soil consents.

(m) The filing of a debtor's petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer as provided in subdivision (a) is filed. In proceedings under this section, except as otherwise provided therein, the jurisdiction and powers of the court, the title, powers, and duties of its officers and, subject to the approval of the court, their fees, the duties of the debtor, and the rights and liabilities of creditors, and of all persons with respect to the property of the debtor and the jurisdiction of appellate courts shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was filed and any decree of adjudication thereafter entered shall have the same effect as if it had been entered on that day.

(n) In addition to the provisions of section 29 of this title for the staying of pending suits, the court, on such notice and on such terms, if any, as it deems fair and equitable, may enjoin secured creditors who may be affected by the extension proposal from proceeding in any court for the enforce-

ment of their claims until the extension has been confirmed or denied by the court.

(o) The judges of the courts of bankruptcy shall appoint sufficient referees to sit in convenient places to expedite the proceedings under this section.

(p) Involuntary proceedings under this section shall not be taken against a wage earner. (July 1, 1898, c. 541, s. 74, as added, Mar. 3, 1933, c. 204, s. 1, 47 Stat.)"

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Supreme Court of the United States

MANHATTAN PROPERTIES, INC.,

Petitioner,

vs.

505.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson & Co., Inc.,

Respondent.

SAMUEL R. BROWN, ALMIRA B. MALLARD, ALFRED MALLARD and HUGH MALLARD,

Petitioners,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation, 506.

Respondent.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE COTTON TEXTILE MERCHANTS ASSOCIATION OF NEW YORK, WHOSE MEMBERS, AS GENERAL MERCHANDISE CREDITORS, HAVE NUMEROUS CLAIMS IN BANKRUPTCY PROCEEDINGS.

Foreword.

This brief is submitted on behalf of the members of the Cotton Textile Merchants Association of New York, whose business constitutes the major portion of the primary distribution of cotton goods throughout the whole country. The members of the Association, as general merchandise creditors, have on file many proofs of claim in numerous bankruptcy proceedings now pending throughout the country and in the ordinary course of events will file many more in the future.

The Association has believed it necessary for the protection of the interests of its members as such general merchandise creditors to appear in these proceedings on certiorari, if the Court will permit, and to put forward the grounds which it believes exist for the continuation of the rule laid down by the United States Circuit Court of Appeals for the Second Circuit in *In re Roth & Appel*, 181 Fed. 67.

We believe the submission of this brief is apt in the light of the fact that briefs are being submitted in behalf of many landlords with a view to obtaining a reversal of the rule laid down in *In re Roth & Appel, supra,* and because upon the questions involved in these proceedings, it appears that the interests of landlords as a class are definitely opposed to the interests of general merchandise creditors.

POINT I.

The rule landlords seek to change.

The rule laid down in *In re Roth & Appel, supra,* is simply that rent accruing after the filing of the petition in bankruptcy is not provable even though the lease contain a covenant to pay it and even where the lessee had in addition covenanted to indemnify the lessor *seriatim* in case of re-entry for breach of condition.

It is not our purpose in this brief to attempt a thorough analysis of the decisions for that will doubtless be presented to the Court by the eminent counsel for the parties in the above entitled proceedings. Furthermore, the whole subject, together with the decisions bearing upon it, has been most ably presented by Wolfgang S. Schwabacher, Esq., and Sidney C. Weinstein, Esq., both of the New York Bar, in their article entitled, "Rent Claims in Bankruptcy," which appeared in the Columbia Law Review (Vol. XXXIII,

No. 2, Feb., 1933). The decision of the Court, however, in these proceedings will have a very far-reaching effect upon the rights of general merchandise creditors. If the rule now in force should be changed so as to permit landlords' claims for future rent—or indemnity—to be allowed, it is plain that in many, if not in most, bankruptcies of firms of large business, the claims of landlords for future rent might well equal, if not heavily exceed, the sum total of all other claims; in this way reducing, in many cases doubtless almost to the vanishing point, that portion of the bankrupt estate available for dividends to general merchandise creditors. Landlords are already in a preferred position in bankruptcy cases, since at least they get their property back. To adopt a rule which in addition to this would enable the landlords to receive—as would result in so many bankruptcy cases—the lion's share of the estate would, we submit, work such a serious injustice to the general merchandise creditors as to render the bankruptcy law almost of no service whatever to them, even though they are, as a rule, the ones who have given life to the bankrupt's business and whose contribution has made the bankrupt's business possible.

POINT II.

Claims of general merchandise creditors are based on business transactions undertaken in reliance on financial statements which do not include rent to accrue in the future as among the "liabilities".

To change the rule so as to allow claims for future rent would be tantamount to approving a fraud upon the general merchandise creditors. They enter upon the business transactions which are the bases of claims in bankruptcy in reliance upon statements by the bankrupts of their assets and liabilities. The Court is doubtless aware

that such statements do not include under the heading of "liabilities" rent to accrue in the future; and this has been proper in the light of the rule now existing. Business has been and is being done throughout the country in reliance upon such statements and with no knowledge on the part of the general merchandise creditors of the existence of any such overwhelming liability as might be ascertained from an examination of the bankrupts' leases. To upset the rule would therefore be to upset the general course of dealing throughout the country and bring into business transactions generally a further and most undesirable element of doubt and uncertainty.

In terms of abstract justice—whatever that may mean—is there any basis for the landlord to be still further preferred over the general merchandise creditor? The general creditors, whose goods have made the bankrupt's business, take the bitter with the sweet through the cycles of prosperity and depression. Why should a rule be adopted which would place the landlord in a still more preferred position? In this connection the Court will doubtless take judicial notice of the fact that before a lease is made very much more critical consideration is given to protection of the landlord's rights than to the tenant's. It might even be said that we have scarcely ever seen a lease which contains a provision binding the landlord to do anything except to put the tenant into possession. The great bulk of leases is filled with obligations incurred by the tenant to which he generally must accede if he is to occupy the property. And some of these provisions are amazing in their onerousness, particularly the provisions so frequently inserted which bind the tenant to pay for five, ten, fifteen, twenty-one years, or even more—in case the tenant gets into finacial difficulties—the difference between the rent reserved and the rental value. These provisions are obviously of no avail against a tenant corporation which becomes bankrupt, but are really inserted in the hope of securing

for the landlord the lion's share of the bankrupt estate to the detriment of all other creditors who deal with the bankrupt upon the faith of its financial statement, which invariably excludes any such contingent liability.

POINT III.

The estimation of damages for breach of covenants to pay rent through future years is generally too speculative to permit of proof with reasonable accuracy.

The difficulty of approximating the actual loss to the landlord over the balance of a term of years is a further reason for adhering to the existing rule; for example, suppose the bankruptcy of a tenant took place in 1928 and the landlord attempted to prove as his damage the difference between the rent reserved in the lease and the rental value of the property during the balance of the term. The proof would be chiefly out of the mouths of experts and real estate brokers, etc. The witnesses who in 1928 would have foreseen the conditions realized in the following five years would have been few indeed. The conclusion would have been reached, in all probability, that no damage was shown: On the other hand, similar proceedings in relation to a bankruptcy of a tenant a few years later would doubtless have adduced testimony and evidence of great loss over the following years. The history of the country shows however so many cycles of prosperity and depression that it is impractical to adopt the estimates of such witnesses as to the demand for real estate five or six years later and, of course, many leases extend for many times such a period. It may therefore well be concluded that the loss a landlord may suffer is so contingent, so uncertain—the years may actually show him a profit—as to render any attempt to fix it too speculative to be indulged in.

POINT IV.

The local law is controlling as to the effect to be given to instruments conveying interests in real property.

To change the rule as urged in behalf of the landlord would be to run counter to the law in many states: in New York, for instance, the rule has been laid down by the Court of Appeals that no cause of action for future rent, or for damages for the breach of a tenant's covenant to pay the difference between the rent reserved and the rental value, accrues until that difference has been ascertained, which can only be at the ends of the various periods provided in the lease as they are reached, or at the end of the term.

McCready v. *Lindenborn*, 172 N. Y. 400.

In this case the Court of Appeals said (at p. 408):

> "We do not sustain the theory upon which the majority of the learned judges of the Appellate Division proceeded to judgment, to wit, that an action will lie for the breach of the lease as an entirety and the recovery of all the damages in a single action brought before the expiration of the term. The breach of an agreement to pay money in installments is not a breach of the entire contract and will not permit a recovery of all the damages in advance."

This decision was discussed by the Court of Appeals with approval in:

Hermitage v. *Levine*, 248 N. Y. 333.

In this case the facts were that the plaintiff had leased to the defendant a seven-story building for a term of 21

years ending in October, 1945, at a rent of $72,000 per year *"payable monthly in advance"*. The defendant went into possession, paid the rent for only a few months and was then dispossessed December 31, 1924.

The lease contained the following provision:

> "In case the tenant shall be dispossessed or ejected, or shall remove from or abandon the demised premises after a demand for the rent or the service of a notice as provided by section 1410 of the Civil Practice Act, or after the commencement of dispossess proceedings, or for any other reason, the landlord may re-enter the said premises by force or process of law or otherwise, and relet the same as agent for the tenant, and the tenant shall remain liable for all damages which the landlord may sustain by any such breach of this agreement, or through such entry or reletting."

The landlord made diligent effort to relet and, by August 1, 1926, had relet the entire building to different tenants, but for varying terms, none of which equalled the 21 years. In March, 1926, the landlord brought this action "to recover the damages suffered by the landlord through the deficiency of rents computed to that time" (p. 336).

The Court said:

> "The principal question is whether the action is premature" (p. 336).
>
> "Is there to be a single cause of action in which all the damage will be computed down to October, 1945, or are there to be monthly causes of action to recover successive deficits, though conceivably new leases made when the present ones are over will make the net result a surplus?" (p. 337).
>
> "No doubt, a damage clause can be drawn in

such a way as to make a tenant responsible for monthly deficits after the re-entry of his landlord, and this without charging the landlord with a duty to account for a surplus in other seasons. Such a clause will be found in *McCready* v. *Lindenborn* (172 N. Y. 400), where the lease was to the effect that the tenant would pay the difference in rent 'in equal monthly payments as the amount of such difference shall from time to time be ascertained'. * * * None the less, in the absence of a provision that points with reasonable clearness to a different construction, a liability for damages resulting from a reletting is single and entire, not multiple and several. The deficiency is to be ascertained when the term is at an end (*Harding* v. *Austin*, 93 App. Div. 564 [per Willard Bartlett, *J.*]; *Halpern* v. *Manhattan Ave. Theatre Corp.*, 173 App. Div. 610, 220 N. Y. 655; *Darmstadt* v. *Knickerbocker C. & E. S. Co.*, 104 Misc. Rep. 547, App. Term, per Lehman, *J.*; 188 App. Div. 129). The tenant when ejected ceases to be a tenant. What he covenants to pay is the damage, not the rent. To hold him for monthly deficits is to charge him with the obligations of a tenant without any of the privileges. He must pay in the lean months, without recouping in the fat ones. He must do this, though it may turn out in the end that there has been a gain and not a loss. A liability so heavy may not rest upon uncertain inference."

These decisions show, then, that no cause of action exists for the deficiency until the lease itself, or the period specified in it, has come to an end. In *McCready* v. *Lindenborn* (*supra*) the deficiency could be determined at the end of each month. Then, and only then,—*if* there was a deficiency—the right of action arose; but only for that month's deficiency. In *Hermitage* v. *Levine* (*supra*) the

right of action did not arise until the whole remaining nineteen years had elapsed, and had shown a deficiency. These decisions are in accord as holding that there is no action for estimated damages through the coming years, and they are the law in New York. It would therefore seem anomalous to adopt a rule in bankruptcy which declared that a cause of action existed in favor of one citizen of the State of New York, for instance, against another, when the highest Court of that State has interpreted the law of that State as not conferring any such cause of action. How therefore could a landlord's claim for damages, as for the breach of the lease as an entirety, be allowed in bankruptcy when the Courts of the State have ruled that he has no such cause of action? Indeed, the decisions of this Court would seem to forbid the allowance of a claim in bankruptcy based upon a state of facts which the state courts hold confers no cause of action, particularly where the construction of an instrument conveying an interest in real estate, etc., is concerned; and, a lease for more than three years is an interest in real property in the State of New York (N. Y. Real Property Law, §§2, 240, 290). The law was stated by this Court in

United States v. *Fox*, 94 U. S. 315

> "And it is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated" (p. 320).

Again, in *DeVaughn et al.* v. *Hutchinson et al.*, 165 U. S. 566, 17 Sup. Ct. Rep. 461, this Court declared the rule as follows:

> "It is a principle firmly established that to the

> law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, *and for the effect* and construction *of* wills and other *conveyances.*" Citing cases (p. 462). (Italics ours.)

In the absence therefore of legislative enactment, it would appear to be contrary both to the decisions of this Court and to the provisions of the judiciary act (declaring that the laws of the several states, except when the constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply) for the Federal Courts to adopt a construction of instruments conveying an interest in real property contrary to that adopted by the Courts of the several states.

While doubtless the New York doctrine, as defined in the decisions of the Court of Appeals referred to above, has not been adopted by all other states, still if any modification of the rule laid down in *In re Roth & Appel, supra,* should be deemed advisable, it is submitted that such modification should only be applicable in the districts where it would be in conformity with the state law.

Conclusion.

As stated in the opinion of the Court below in the above-entitled proceedings:

> "The law, as we now understand it, is therefore that a contingent claim may in general be proved, provided its liquidation does not involve too speculative considerations, confessedly a variable standard."

Therefore, if any modification of the rule should seem advisable, we submit that the allowance of a landlord's claim—for rent, or indemnity, accruing after the filing of the petition—should be limited to proof of damage accruing during the 6-months period allowed for the filing of claims: that is, to proof of the difference in the rent reserved and the rent collected during the 6-months period; or, in any event, to that damage accruing within some reasonable time after adjudication, so that proof of loss with a reasonable approximation to accuracy may be ascertained,—subject always, of course, to the existence of the cause of action, which is the basis of the claim, being recognized by the local State law.

Dated: New York, December 8, 1933.

Respectfully submitted,

REESE D. ALSOP,
Amicus Curiae.

HUNT, HILL & BETTS,
Of Counsel.

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CHARLES ELMORE CL

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC.,
Petitioners,
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co. Inc.,
Respondent.

No. 505.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey Corporation,
Respondent.

No. 506.

BRIEF OF GODFREY GOLDMARK AS AMICUS CURIAE ON BEHALF OF TRUSTEE IN BANKRUPTCY OF McCRORY STORES CORPORATION.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC., *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co. Inc., *Respondent.*	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey Corporation, *Respondent.*	No. 506

BRIEF OF GODFREY GOLDMARK AS AMICUS CURIAE ON BEHALF OF TRUSTEE IN BANKRUPTCY OF McCRORY STORES CORPORATION.

Pursuant to leave granted, this brief is filed on behalf of the Trustee in Bankruptcy of McCrory Stores Corporation, bankrupt.

McCrory Stores Corporation, which with its subsidiaries operated 242 stores throughout the country, was ad-

judicated a bankrupt in New York on January 14, 1933 upon its voluntary petition. The value of the assets of that estate is estimated at between $5,000,000 and $8,000,000 depending on the realizable value of equities in real estate. While merchandise creditors, debenture holders and miscellaneous creditors have filed claims aggregating $9,000,000, landlords have filed claims aggregating $43,000,000 for future rent and damages.

It is evident, therefore, that the Trustee in Bankruptcy of McCrory Stores Corporation representing the creditors in that estate has a real interest in the outcome of these cases.

The Reasons for Filing Brief as Amicus Curiae.

This brief is filed because the underlying questions have recently become of paramount importance to property owners, general creditors, bankrupts, and consequently to the public itself.

During the past two years large corporations operating stores in numerous states throughout the country, and generally known as "chain stores," have as a result of the depression found their volume of business and profits constantly dwindling and have been unable to reduce their expenses proportionately, largely because of the existence of fixed obligations for high rentals on long term leases made during normal or exceedingly prosperous times. Gradually cash and quick assets have been consumed in paying such rents until "equitable insolvency"—the inability to meet obligations as they matured—has resulted, although in some cases not insolvency in the bankruptcy sense. The result has been that in fairness to merchandise creditors, debentureholders and other creditors whose claims had matured, these corporations were bound by voluntary petition to surrender their property to the bankruptcy court for administration. This procedure has in many quarters resulted in the cry that the purpose of the bankruptcy proceeding was to avoid lease obligations, to defraud the

landlords and to enable stockholders of these corporations to become revested with the property after the termination of the bankruptcy proceeding. This contention, however, has overlooked the doctrine of the *Boyd* case (*Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482).*

The foregoing is the background which has caused these cases to excite a general interest.

The Present Rule and its General Acceptance.

For many years since the enactment of the Bankruptcy Act of 1898, it has been the general view that under the ordinary form of leases exacted by landlords, claims for future rent or for damages for breach of lease obligations are neither provable nor dischargeable in bankruptcy. For the second circuit, the question was deemed decided in 1910 in *In re Roth & Appel*, 181 Fed. 667, which but followed a similar ruling under the Act of 1867 *Ex parte Houghton*, 1 Lowell, 554. For the Eighth Circuit including Nebraska it was decided in *Watson* v. *Merrill*, 136 Fed. 359 in 1905. In a majority of the circuits the same rule has obtained. Relying upon the doctrine of these cases, credit has been extended for untold millions upon the confident assumption that if bankruptcy of the person obtaining credit ensued, the speculative claims of landlords for future rent or damages growing out of long term leases would not share with the ordinary unsecured general creditor in the distribution of the bankrupt's assets.

During all the intervening years, landlords have evidently been content with this interpretation of the 1898 Act because no evidence is found of any effort either to bring the question to this court for determination or to amend the law until the recent agitation. *The very leases here considered were made with knowledge of the existence of the accepted and prevailing rule of interpretation of the*

*For general discussion of the applicability of that case to the situation above described, see "Landlord Claims In Reorganization" by William O. Douglas and Jerome Frank, 42 Yale Law Journal, 1003, 1933.

covenants here involved. The rule has been considered a fixed rule of bankruptcy upon which all business transactions and the extension of credits have been predicated.

Under these circumstances, the injustice to the ordinary general creditor of now permitting claims of landlords of many millions of dollars to share pari passu in the distribution of the bankrupt's assets, need not be enlarged upon.

In *Maynard* v. *Elliott*, 283 U. S. 273, 277, in discussing the question of the provability of claims against endorsers under certain circumstances and the effect of the establishment of a rule contrary to that deemed to be in force, this Court said:

> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance."

That principle of construction is peculiarly applicable here.

The Question is for Congress.

Perhaps after a careful study of the whole subject Congress may for the future provide some fair measure of participation for landlords despite the termination of a lease by re-entry. (See for example suggestions of Committee set forth in footnote on p. 7.) Perhaps on the other hand Congress may deem the question a local one to be determined by each State and that the landlord's right in bankruptcy should be limited to the right to a priority or a lien for rent for a given period, as is now provided by the statutes of many States and protected by Sections 67 and 64 of the Bankruptcy Act.* Perhaps on the other hand, landlords should be in the same class as tort

* See for example *Martin* v. *Orgain*, 174 Fed. 772 (C. C. A. 5th) upholding a lien for rent accruing after bankruptcy under a Texas statute.

claimants or claimants under the Workmen's Compensation Act whose claims are neither provable nor dischargeable in bankruptcy.

Schall v. *Camors*, 251 U. S. 239;
Lane v. *Industrial Com'r of New York*, 54 Fed. (2d) 338.

In *Schall* v. *Camors*, supra, as the briefs show, it was strenuously argued that tort claims should be provable in bankruptcy; that it was the underlying purpose of the Bankruptcy Act to permit all creditors to share in the bankrupt estate; that claims which are not provable are not discharged; and that it was contrary to one of the underlying purposes of the Bankruptcy Act to deny the right to prove such claims because as a result the bankrupt would not be discharged.

Despite all this argument, this court held that it was not the intention under the Act of 1898 to allow ordinary tort claims based on nonfeasance or malfeasance without unjust enrichment to be proved and held if any remedy were needed, it was a question for Congress. Although fourteen years have elapsed since that decision, no amendment has been passed or agitated looking for the allowance of tort claims in bankruptcy.

Broadly speaking, it is as unjust to tort claimants to deprive them of their right to share in the assets of the corporate bankrupt as it is claimed to be unjust to a landlord, and it is unjust to the individual bankrupt to keep alive against him claims in tort (not resulting in unjust enrichment) as it is to keep alive lease obligations.

Accordingly, whether and to what extent there should be a change in this situation is obviously a legislative and not a judicial question. It is a question upon which different minds may differ radically. For example, the attempt to speculate upon and presently determine future damages growing out of the breach of long term leases, and the inclusion of the amount of an expert's guess of such dam-

ages, as a provable claim to cut down the dividends of other creditors, may well result in the curtailing of credit in the future unless long term leases are abolished. Whether the landlords themselves would desire such a result may well be doubted.

Fixed legal rules acquiesced in and relied upon in every day commercial transactions for a long period of time may be changed by Congress in the future after full consideration, but injustice and hardship must result if these rules are changed for the past by a reversal of the long accepted rule unless required by "compelling language in the statute." *That there is none such but that on the contrary Congress did not intend to include such claims as provable debts will be shown hereafter.*

Pending Legislation.

At the very last session of Congress, a bill was introduced H.R. 5884 (73rd Congress, 1st Session), which included a provision for the amendment of Section 63 of the Bankruptcy Act so as to provide for the inclusion of provable debts of claims upon workmen's compensation awards and claims for damages upon leases.[1] The bill did not pass.

At this very time there is also under consideration the third tentative draft of amendments to the Bankruptcy Act proposed by a representative committee under the lead of Paul H. King, Esq., Chairman of the Committee on Bankruptcy of the Michigan State Bar Association and Chairman of the Committee on Uniformity of Practice of the National Association of Referees in Bankruptcy. That Committee's recommendations with respect to the provability

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[1] "Sec. 4. (a) Section 63(a) of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, as amended, is amended to read as follows: * * *.

"(6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; and (7) claims for damages respecting executory contracts including future rent whether the bankrupt be an individual or a corporation, which claims shall be liquidated under section 63(b) of this Act."

of claims growing out of leases set forth below show that the competent draftsmen are aware of the possible injustice to other creditors in permitting landlords to prove claims for future rent as suggested in H. R. 5884 (73rd Congress) quoted at page 6 supra, or for damages for breach of an entire lease.[2]

The whole subject should be left to Congress for further consideration.

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[2]The Committee includes Mr. James A. McLaughlin of the Harvard Law School, Mr. Peter B. Olney, Jr., a New York Referee, Mr. Harold Remington, author of Remington on Bankruptcy, and Mr. Edwin S. S. Sunderland of the law firm of Davis, Polk, Wardwell, Gardiner & Reed.

The third tentative draft of amendments of that Committee contains the following addition to Section 70 of the Bankruptcy Act:

"b. The adjudication in bankruptcy shall constitute an anticipatory breach as of the date of the petition, without regard to the actionability of anticipatory breaches under state law, of any contract non-assignable on the part of the bankrupt or not adopted by a trustee within a reasonable time after his qualification and within four months after the adjudication whether a trustee has qualified or not. An unexpired lease of real or personal property is an executory contract within the meaning of this paragraph and claims for loss of the unexpired portion thereof shall be provable if either party become bankrupt. A discharge shall relieve a bankrupt of all liability under leases or other executory contracts entered into before the petition except as otherwise provided in Section 17. The bankruptcy of a landlord, however, shall not work forfeiture of the tenant's estate and shall give the landlord's trustee in bankruptcy no election to terminate the estate. A general covenant in a lease that it shall not be assigned shall not be construed to prevent such lease passing to the trustee at his election, but an express covenant that the bankruptcy of a specified party thereto or of either party shall terminate the lease at the election of the other party shall be valid."

It also proposed the following amendment to Section 63(4) of the Act:

"(4) founded upon an open account, or upon a contract express or implied, including claims for anticipatory breach, as provided in section 70(b): Provided, however, that a claim of a landlord for anticipatory breach of an unexpired lease of real estate *shall in no event be proved or allowed in an amount exceeding the rent reserved by the lease for the year next succeeding the bankruptcy;*"

And it proposed the following as Section 63(b) of the Act:

"b Contingent claims and claims for anticipatory breach shall be barred by a discharge, unless submitted under oath for allowance as provided in Section 57, and shall be deemed provable unless the court finds the contingencies incapable of being fairly estimated, in which event such claims shall not be deemed provable."

And the following as Section 63(c):

"c (b) Unliquidated contingent claims and claims for anticipatory breach of contract (claims against the bankrupt) may (, pursuant to application to the court,) be liquidated in such manner as (it) the court shall direct. (, and may thereafter be proved and allowed against his estate.) The liquidation of a contingent claim, or a claim for anticipatory breach of contract, may be postponed until it appears whether or not such claim is to become capable of being fairly estimated without unduly delaying the administration of the estate."

Words proposed to be deleted from the present Act are enclosed in parenthesis.

The Question Presented in these Two Cases.

Because of the particular covenants contained in the particular leases here involved, these two cases *do not* present the broad question whether claims for future rent are provable in bankruptcy.* They do not present the question whether under some form of covenant not contained in these cases provable claims for damages might be presented. *Obviously these cases present the sole question whether the courts below erred in expunging the particular claims predicated upon the particular covenants in the leases between the claimants and the bankrupt which covenants expressly contemplated bankruptcy of the tenant and provided for the rights and obligations flowing therefrom.*

BRIEF OF THE ARGUMENT.

I.

The provability of claims must be determined as of the date of the filing of the petition in bankruptcy. On that day each creditor with a provable claim gets an interest in rem in the assets of the bankrupt.

II.

The leases here involved contemplated the possible bankruptcy of the tenants and contained express covenants of indemnification against loss, fixing the landlords' rights and the method and time of enforcement of the tenants' obligations in such event. There is therefore no basis for attempting to invoke the doctrine of anticipatory breach of contract on the theory of implied covenants against going into bankruptcy as was done in the *Chicago Auditorium* case, 240 U. S. 581. These express covenants measure the

* See *infra*, page 30.

landlords' rights and do not create a provable claim. The decisions of the New York Court of Appeals and two unreported and clearly reasoned decisions support these views. Nor can there be an anticipatory breach of these express covenants by bankruptcy because the covenants only became effective upon the tenants' bankruptcy and could not be breached by that very fact.

III.

Even if the foregoing contentions are not sustained then nevertheless the claims under the covenants are so contingent that they are not provable. Congress by omitting the provisions for the proof of contingent claims contained in the 1867 Act intended that such claims should not be provable and the omitted provisions cannot be put back by construction. The decided cases, too, show that such claims are contingent and not provable. *Maynard* v. *Elliott*, 283 U. S. 273, does not militate against but on the contrary supports these views.

IV.

The petitioners' brief asks this Court to disregard history, precedent and rules of statutory construction and to make all claims for loss of future rent provable irrespective of covenants and irrespective of their reentry upon the leased premises. Their argument leads to impossible results. Obviously the whole question is for Congress.

V.

The amendments of 1933 do not make the claims provable. The provisions are not retroactive and could not be made so.

POINT I.

Provable debts include only those provable at the filing of the petition in bankruptcy.

The foregoing rule is established by the following cases:

In *Williams* v. *U. S. Fidelity & G. Co.*, 236 U. S. 549, 556, this Court said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation. Dunbar *v.* Dunbar, 190 U. S. 340, 350; Crawford *v.* Burke, 195 U. S. 176, 187; Grant Shoe Co. *v.* Laird, 212 U. S. 445, 448; Zavelo *v.* Reeves, 227 U. S. 625, 631."

In *Zavelo* v. *Reeves,* 227 U. S. 625, the bankrupt between the filing of the petition and his discharge agreed to pay one of his provable debts. The question was whether the debt was discharged. This court held that it was not, and in the course of its opinion, said at page 631:

> "But, reading the whole of Section 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under Section 63a 4 *include only such as existed at the time of the filing** of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, 1898, under the authority conferred by Section 30, a form of discharge was prescribed (Forms in Bankruptcy No. 59) by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of A. D. , on which day the petition for adjudication was filed him; excepting such debts as are by law excepted

*Italics supplied throughout.

> from the operation of a discharge in bankruptcy'. And the forms prescribed for proof of debts all declare that the indebtedness existed 'at and before the filing of the said petition'. Forms 31 to 36 inclusive. The General Orders and Forms, etc., are to be found in 172 U. S. Appendix; 89 Fed. Rep., Preface; 32 C. C. A. Preface; 3 Foster's Fed. Pract. (4th ed.) 2526, 2559, 2572."

And in *Maynard* v. *Elliott,* 283 U. S. 273, 275, this Court said:

> "Although the omission of any reference to contingent claims in Section 63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed."

The statement in the latter case that the claim need not be "absolutely owing", when the petition is filed perhaps overlooks the requirement of Section 57(a) of the Act, which provides as follows:

> "Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, *and that the sum claimed is justly* OWING *from the bankrupt to the creditor.*"

One of the reasons for the rule that the date of the filing of the petition is the date upon which provability of claims must be determined, is that upon the filing of the bankruptcy petition (followed of course by adjudication) each creditor with a provable claim gets a right in rem in the assets of the bankrupt which is in the nature of a lien upon such part of the property of the bankrupt

as the amount of the creditor's provable claim bears at that time to the entire amount of the provable claims. This is a vested right in property.

Board of Commissioners v. *Hurley*, 169 Fed. 92;
Chemical Bank v. *Armstrong*, 59 Fed. 372, 378;
Sexton v. *Dreyfus*, 219 U. S. 339, 345.

Again the whole scheme of the Bankruptcy Act is that the date of the filing of the petition is the date for determining the substantive rights of the parties. Thus where a bankrupt dies after the filing of a petition and even before adjudication, the Trustee gets only the surrender value of life insurance policies and the remainder of the proceeds of the policy goes to the beneficiary.

Everett v. *Judson*, 228 U. S. 474.

And where a creditor has a claim against a principal and surety and both are in bankruptcy, the creditor's rights against the two estates are fixed as of the time of the filing of the petition.

Board of Commissioners v. *Hurley*, *supra*.

So, too, as to the vesting of title in the Trustee under Section 70 of the Bankruptcy Act as construed in the *Judson* case.

In the light of this rule, it will be shown that at the time of the filing of the petition in bankruptcy neither claimant here had a provable claim in bankruptcy.

POINT II.

The leases here involved contemplated the possible bankruptcy of the tenants and contained express covenants fixing the landlords' rights and the tenant's obligations in such event. There is, therefore, no basis for attempting to invoke the doctrine of anticipatory breach of contract on the theory of an implied covenant against going into bankruptcy. These express covenants measure the landlord's rights and do not create a provable claim.

In the leading case of *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581, this Court held that the bankruptcy of the transfer company constituted an anticipatory breach of its contract to furnish service to the Auditorium Hotel because the bankruptcy stripped the transfer company of its assets which were needed in the performance of the contract and therefore disabled it from performing its obligation. The very basis of the court's decision was found in the following sentence:

> "In short, it must be deemed an *implied* term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement." 240 U. S. at 591.

In the present cases, the situation is wholly different. Unlike the *Auditorium* case the parties here did not impliedly undertake with respect to bankruptcy and leave it to the law to determine their rights. On the contrary the parties contemplated the possibility of bankruptcy of the tenant and *expressly* provided the rights and obligations which should flow therefrom. The leases, presumably containing clauses exacted by the landlords, provided that the

bankruptcy of the tenant should be an act of default, and provided that thereupon the landlord at his option might re-enter the premises; and provided that in the event of such re-entry in the one case (#595, Record, p. 12) that the tenant would pay at the end of each month the difference between the reserved rental and the avails of reletting, and in the other case (#506, Record, p. 28) that the tenant would "indemnify" the lessor against all loss of rent which the landlord might incur by reason of the termination during the residue of the term. *The parties having thus expressly provided for the rights and the remedies flowing from the tenant's bankruptcy, there cannot be implied either in law or in fact any other remedy or any measure of damages other than that so solemnly contracted for.*

In *Miller v. Schloss,* 218 N. Y. 400, the New York Court of Appeals said at page 406:

> "A contract cannot be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged; *or where there is an express contract covering the subject matter involved;* or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted (Morse *v.* Kenney, 87 Vt. 445; Mathie *v.* Hancock, 78 Vt. 414; Hertzog *v.* Hertzog, 29 Pa. St. 465; Earle *v.* Coburn, 130 Mass. 596; Central Bridge Corporation *v.* Abbott, 4 Cush. 473)."

This general principle has specifically been applied to the situation here presented by the New York Court of Appeals in *McCready* v. *Lindenborn,* 172 N. Y. 400.

When read together the bill of complaint and the bill of particulars as pointed out by the Court of Appeals, set forth three causes of action—"one for rent accrued, a second for breach of covenant to pay the deficiency, *and a third cause of action for a total breach of the*

lease." In that case, as here, the lease provided that the landlord could re-enter on the failure of the tenant to pay rent and that if he did so the tenant should become liable to pay him by way of damages "the difference between the amount of rent reserved and the amounts of rents which shall be collected and received or might with due diligence be collected and received from said demised premises during the residue of said term remaining unexpired at or immediately before the time of such re-entry —in equal monthly payments as the amount of such difference shall from time to time be ascertained". And in that case, as here, the landlord instead of relying upon the remedy given him by the lease tried to rely on a common law right to treat the lessee's non-payment of rent and repudiation of his rent covenant as a breach of the entire lease so that he might retake possession *and sue at once for damages for breach of the entire lease.* There, as here, the landlord preferred the common law right, if there was one, of suing at one time for damages for breach of the whole lease to the right given him by the lease which was to sue from month to month as and if there was a difference between the amount of rent reserved and the amounts collected from the premises on a re-letting.

The trial court, however, ruled that plaintiff, in bringing action for damages for breach of the entire lease was premature and refused to permit plaintiff to introduce evidence as to her damages. Thereupon, plaintiff took exceptions to the Appellate Division which reversed the trial court and held that the plaintiff at common law could treat the non-payment of rent and the lessee's repudiation as a breach of the entire lease and could re-enter and sue for damages for such breach at once and that she did not have to rely on the remedies given her by the covenants of the lease. The Appellate Division said, 63 App. Div. 106, 111:

> "By the commencement of this action, however, the plaintiff alleged a total breach of the lease by the defendant and sought to recover in this action the damages sustained by reason of the breach. The

action was not brought to enforce the covenant to pay rent. There can be no doubt but that the plaintiff would have had the right under the covenants contained in this lease to re-enter to lease the property and to recover under the lease the difference between the rent reserved and the amount that she was able to realize from the property. *She did not adopt that course, but elected to treat the act of the defendant as a total breach of the lease and to recover in one action the damages sustained by such breach, and the question is whether or not such an action can be maintained.* The distinction between an action to recover money due under an agreement and an action to recover the damages sustained by a breach of the agreement, is well recognized. The legal effect of a breach of a contract of hiring for a definite period and the right of a party to it after such breach was exhaustively examined by the court in Howard *v.* Daly (61 N. Y. 362). In that case, it was held that 'A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. (2) He may rescind the contract; in which case he could sue on a quantum meruit, for services actually rendered. These remedies are independent of and additional to his right to sue for wages, for sums actually earned and due by the terms of the contract.' The learned judge also examined the rule to be applied in case of the defendant's repudiation of the contract at the time of entering into the service, and he held, following the cases of Hochster *v.* De La Tour (2 El. & Bl. 678) and Frost *v.* Knight (L. R. (7 Exch.) 111 revg. S. C. L. R. (5 Exch.) 322), that the opposite party has an option either to treat the contract as subsisting, and when the day arrives for commencing to serve to offer to perform, or to regard it as immediately broken, and to sue before the day arrives. This distinction between an action to recover damages for the breach of a contract which is in its character executory, containing mutual covenants by the contracting parties, and an action to enforce the covenants and agreement of such a contract is recognized in all the cases, and is based upon the right of a

party to such an agreement to elect whether he will consider the contract as broken and destroyed, and demand in one action the damages sustained, or, notwithstanding the refusal of one party to carry out the contract, will bring an action to enforce its covenants. *I can see no reason why this principle should not apply to a lease as well as to any other contract which is in its nature executory, or which contains obligations to be performed in the future. Undoubtedly in this case the plaintiff could under the covenants in the lease have re-entered and recovered from the defendant the difference between the rent reserved and the amount realized from the property. But upon what principle was the plaintiff confined to such a course? What was there to prevent her from treating this refusal of the defendant to enter into possession of the premises and comply with the conditions of the lease as a total breach, and sue him for the damages thereby sustained?"*

From this ruling, the defendant appealed and the Court of Appeals rejected the entire argument of the Court below.

The Court of Appeals ruled that at common law the landlord could not treat non-payment of rent and repudiation as a breach of the entire lease, and consequently that plaintiff could not at once sue for damages for breach of the entire lease. The Court ruled that plaintiff's only remedy was that provided by the lease, namely, to sue for month to month as a deficiency between the agreed rental and the amount collected from the premises appeared.

The Court of Appeals at pages 408, 409, said:

"We do not sustain the theory upon which the majority of the learned judges of the Appellate Division proceeded to judgment, to wit, that an action will lie for the breach of the lease as an entirety and the recovery of all the damages in a single action brought before the expiration of the term. The breach of an agreement to pay money in installments is not a breach of the entire contract and will not permit a recovery of all the damages in advance

(Wharton & Co. *v.* Winch, 140 N. Y. 287; Moore *v.* Taylor, 42 Hun, 45.) So far as appears, the failure to pay the rent was the only breach of which the defendant was guilty, for he was under no legal obligation to occupy the demised premises. Even if he refused to recognize the lease as in force, because, as he claimed, the plaintiff failed to make the alterations provided for, this was not a violation of any covenant that he had entered into. His breach consisted simply of a failure to pay money in monthly installments. In Wharton & Co. *v.* Winch (supra) it was held that where a contract for railroad construction provides for payment in installments as the work progresses, a failure to pay an installment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further and to recover the profits which he would have earned had the contract been fully performed. So if a mortgagor refuses to pay the installments as they fall due upon a mortgage given by him, and even if he refuses to recognize the mortgage as in force for some reason, the mortgagee cannot, in the absence of a special provision permitting it, call the whole mortgage due upon the ground of an entire breach.

"There seems to be a distinction, whether well grounded in principle or not, between a contract for the payment of money in future installments and a contract for the delivery of goods in future installments (Nichols *v.* Scranton Steel Company, 137 N. Y. 471), as well as a contract for future employment and service. (Howard *v.* Daly, 61 N. Y. 362.) We think that the contract before us should be governed in this respect by the principle laid down in Wharton & Co. *v.* Winch (supra)."

And then the Court added the following most significant statement:

"Aside from this, however, when the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed."

Thus with respect to the effect of the covenant to pay damages at the end of each month, the Court held that there could be no recovery until the damages had actually accrued and then only in the mode provided for in the covenant itself. This case has been cited with approval in later New York Cases. And the same principles have been held applicable in a case where a covenant provided for "indemnity" rather than for the admeasurement of damages at the end of each month.

Hermitage Co. v. *Levine*, 248 N. Y. 333.
In re Wise Shoes, Inc., 2 Fed. Supp. 521, affirmed without opinion 64 Fed. (2d) 1023.

So also in the instant case the claims cannot be proved and allowed because to do so would be contrary to the contracts between the parties which expressly provided for damages measured by the loss actually to be suffered in the future as determined by a reletting. Obviously before any payment can be made to these claimants, their contract requires that this loss must be ascertained.

Thus in at least two equity receiverships in the lower federal courts, claims similar to those of the creditors here, were held not provable on the ground just stated.

In the Equity Receivership of J. M. Gidding & Co. in the Southern District of New York (Charles H. Mears, plaintiff, against J. M. Gidding & Co. Inc. defendant, Equity 27-141), the landlord filed a claim upon a lease containing a covenant practically identical with that in No. 505. The claim of the landlord and the Receiver's objections thereto were referred to the late Wallace Macfarlane of the New York Bar as Special Master. His report disallowing the claim (to which no exception was taken), although only the report of a Special Master, is quoted in part below because of his preeminence at the New York Bar and the clarity and force of his reasoning. The opinion in its entirety is annexed hereto at page 58.

In that case, a claim for $36,497. was filed for damages representing the loss for the unexpired term. The Master said:

> "This item of $36,497. represents the excess of the total rent reserved for the unexpired term over the alleged estimated value thereof, which is stated in the claim (Ex. 1, subd. 13) to be $13,000. per annum. It is expressly claimed, however, as damages sustained by the lessor under the lessee's covenant to continue to be liable after the termination of the lease for a sum equivalent to the amount of all the rent reserved in the lease less the avails of reletting, *such damages to be due and payable by the* lessee on the several rent days specified in the lease (claim, ex. 1., subds. 11-13).
>
> "The receiver has objected to this item on the ground that the lessee's covenant for continuing liability after reentry of the landlord provides specifically not only that the measure of damages should be the equivalent of the difference between the rent reserved and the avails of reletting, but also that such damages, so measured, '*should be due and payable by the lessee to the lessor upon the several rent days hereinbefore specified*', that is to say, on the first days of June, September, December and March in each year; that this provision was exclusive of any other measure of damages, *and that the lessor was not entitled to claim a present lump sum equal to the excess of the total rent reserved for the unexpired term over the present value of such a lease for the years it has still to run determined by expert testimony.* * * *
>
> "It seems to be ADMITTED in the briefs filed with the master on behalf of the claimant that if her right to damages must be determined by the language of the lessee's covenant for continuing liability, the claim now made by her under that covenant will not be provable; but it is argued that the receivership and the insolvency of the lessee constitute an *anticipatory breach* of this covenant, relieving the lessor from its provisions in respect to payment of damages and entitling her to prove her whole damages as of the present time in a lump sum on the basis of a comparison between the present value of the unex-

pired term and the rent reserved for the seventeen years that the lease has still to run. * * *

"The lessee's alleged 'anticipatory breach' of the covenants of the lease to pay rent and taxes and perform other obligations as tenant, was a consequence of its insolvency and the receivership. The lessee thereby became unable, and the receiver refused, to perform any longer the covenants of the lease imposing obligations upon the lessee as tenant. This breach led to the termination of the lease and the annulment of the relation of landlord and tenant. The termination of the lease and the reentry by the landlord through summary proceedings brought into active operation the agreement continuing the personal liability of the lessee, which, though contained in the lease, was wholly unconnected with the use of the land. This special agreement provides with completeness and precision just what the continuing liability of the former tenant for damages should be, how the damages should be ascertained and even when they should become due and payable. Without this special agreement, the tenant, after the reentry of the landlord by summary proceedings would have been under no further liability at all arising out of the lease proper. (C. P. A. 1434, *Hall* v. *Gould*, 13 N. Y. 127; *Michaels* v. *Fishel*, 169 N. Y. 381, 387; *Gardiner* v. *Butler*, 245 U. S. 603.

"To say that the anticipatory breach arising from the receivership, as a consequence of which the landlord reentered and annulled the lease, was also a breach of the special agreement of the parties providing what their respective rights and liabilities should be upon such a reentry for such a breach, is an untenable argument. The anticipatory breach in this case affected the special agreement for continuing liability only by giving it vitality and operative effect. * *

"As already shown, the alleged anticipatory breach resulting from the insolvency of Gidding & Co. and the appointment of a receiver, was not a breach of the covenant for continuing liability but operated, through the consequent annulment of the lease, to make that covenant effective. * *

"Other authorities cited in the briefs, while deciding questions analogous to that presented by this

claim, are clearly distinguishable. Those that involve the construction of a lessee's covenants for continuing liability after reentry of the landlord and termination of the lease necessarily turn upon the form of the covenant, and it will be found that apparent differences in the decisions are satisfactorily explained and reconciled by comparison of the covenants involved. In *Filene's Sons Co.* v. *Weed*, 245 U. S. 598 and in the first claim allowed in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the lessee agreed, in the event of reentry and the termination of the lease, to pay the difference between the rental value and the rent and other payments named in the lease for the residue of the term. These covenants were, as the court held, agreements between the parties that the evicted lessee should be liable for a present payment computed according to the familiar rule of damages accruing to a lessor for loss of the profits of the unexpired term. In such cases, the contract provides for a present claim determined precisely in accordance with an agreed rule. On the other hand, where the case presents a covenant which provides that the tenant shall remain liable during the unexpired term for the amount, or the 'equivalent' of the amount, of all the rent reserved less the avails of reletting, without any provision for periodic settlements, the decisions hold with substantial uniformity, that the lessor has no right of action until the completion of the unexpired term, because until that time comes it is impossible to determine what the damages will be, or whether there will be any damages at all. (*Seidlitz* v. *Auerbach*, 186 App. Div. 7, 13 rev. 230 N. Y. 167; *Matter of Hevenor*, 144 N. Y. 271; *Harding* v. *Austin*, 93 App. Div. 564). Substantially similar are the bankruptcy decisions upon covenants which take the form of an agreement by the tenant to indemnify the lessor during the residue of the term for loss of rent and other payments incurred by the termination of the lease. (*In re Ells*, 98 Fed. 967; In re Shaffer, 124 Fed. 111). • • •

"This item of damages, therefore, in the claim presented to the receiver should be disallowed, not because it is contingent and uncertain, but because it is contrary to the contract between the parties,

which expressly provides for damages measured by the difference between the rent reserved and the rent actually received from time to time on reletting, to be ascertained and paid quarterly. Obviously, before it can be paid, it must be ascertained. Undoubtedly, any claim in conformity with the contract covering any period except the quarter falling due March 1, 1924, would have been uncertain, and indeed impossible of estimation, and therefore wholly contingent, because the rents that would be received in future period could not be known and the avails of reletting might in many quarters exceed the rent reserved."

The same conclusion was reached by Circuit Judge Julian W. Mack, while sitting in the District Court in New York, in an unreported opinion in *Western Electric Co.* v. *Powers Accounting Machine Co.* Equity 19-150 copy of which opinion is annexed hereto at page 53. There Judge Mack in refusing to hold provable in equity a claim similar to that in No. 506, said:

> "Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they have provided that on such termination, when but for the provision no damages could be claimed, the lessee 'shall be liable for any loss or deficiency of rent which may be suffered.'
>
> "Not only is there therefore no basis for the claim as filed for the full reserved rent, but even if it were amended so as to charge an actual termination of the lease and in respect to damages therefor to assert, contrary to the contractual provisions a right to the difference between the rents reserved and the actual rental value at the time of termination, it would have to be disallowed."

From the principle affirmed in the *Gidding, Western Electric Co.* and *McCready* cases it follows that the petitioners here had no presently due and enforceable claim

which would have entitled them to bring an action in law or to prove in equity. Their claims were likewise therefore not provable in bankruptcy because as stated by Judge Lowell in *In Re Pettingill,* 137 Fed. 143, 147, and quoted with approval by this Court in the *Chicago Auditorium* case, supra, at page 592:

> "'The test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent to disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under Section 63b (30 Stat. 562).'"

Under this test the petitioners have no claim provable in bankruptcy.

In the light of the foregoing authorities, it is evident that in face of the express covenants contemplating bankruptcy there is no *implied covenant* fixing the rights upon bankruptcy. It is also evident that the landlord may not ignore the express provisions of the leases and assert that bankruptcy gives rise to the anticipatory breach of an "implied covenant" and a present claim for damages.

The bankruptcy of a Tenant does not constitute an Anticipatory Breach of the Covenant to pay damages upon the bankruptcy of the Tenant inasmuch as that covenant only became effective because of the bankruptcy.

Both leases provide just how and when the damages contemplated by the parties following bankruptcy and reentry shall be measured and determined. *The parties have deliberately contracted that the actuality of the future and not the present estimate of future damages shall determine*

the amount of the damage. They both provide that the obligation to pay shall depend upon the actual future event. Neither provides, as it could have done, for a present claim either at the time of bankruptcy or at the time of reentry. *The covenant to pay which survives reentry does not become operative until the bankruptcy and the reentry.*

It is true, as already stated, that this court has held that the bankruptcy of a promisor of an executory bilateral contract constitutes an anticipatory breach of the promise because such insolvency and bankruptcy constitutes a breach of the implied undertaking in every promise that the promisor will not permit himself, through insolvency or bankruptcy or the like, from making performance. But how can such an undertaking possibly be implied in the covenant to indemnify against loss of rents when that very covenant was to come into effect upon the promisor's being disabled by bankruptcy? The parties in expressly providing that bankruptcy should bring into existence of the covenant of indemnification against loss, cannot be assumed to have impliedly provided that that self-same insolvency and bankruptcy should constitute a breach of the very covenant which it brought into existence.

It cannot, therefore, be seriously argued that the bankruptcy itself constituted an anticipatory breach of the very covenant to pay damages when that covenant to pay only became effective upon the very bankruptcy which is alleged to cause the anticipatory breach.

See

Mears v. *J. M. Gidding & Co., supra,* at page 21.
Western Electric Co. v. *Power Accounting Machine Co., supra,* at page 23.

Forms of Covenants Not Here Involved.

Leases of real property of course differ materially in their provisions with respect to the rights of landlords upon various "acts of default" by the tenant and it will be helpful, therefore, clearly to distinguish various other

classes of covenants which have been the subject of consideration by the courts, but which are wholly different from the covenants here involved. The provability of claims under such other covenants is not presented.

Class A. A lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the lease shall *ipso facto* terminate and that the landlord may reenter and that the tenant shall immediately be liable for all the rent for the balance of the term. A claim under such a provision was held by this Court not provable in bankruptcy in *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, upon the ground that the provision was for an unenforceable penalty and that the parties were undertaking to contract for a payment to be made out of the assets of a bankrupt estate, which payment would affect only those entitled to share in the proceeds of the property.

Class B. The lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the landlord *at his election* may *thereafter* re-enter and despite reentry and termination of the lease, the tenant shall *then* pay the difference between the reserved rental discounted and the market value of the lease. Such a claim was held provable in an equity receivership in *Filene's Sons Co.* v. *Weed*, 245 U. S. 597. It is to be noted that the covenant fixes a *present* measure of damages to be based on a prophesy of the future. Whether the claim would be provable in bankruptcy is not presented here.

Class C. The lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the landlord may *at his election* thereafter re-enter, and despite such reentry and termination of the lease, the tenant shall pay at the end of each month the difference between the reserved rental for that month and the actual avails of reletting for that month. Such a claim was held not provable in the equity receivership of *J. M. Gidding & Co. Inc., supra.*

Class D. The lease may provide that in the event of non-payment of rent or in the event of the bankruptcy of the tenant, the landlord may at his election thereafter reenter and despite such reentry and termination of the lease, the tenant agrees to *indemnify* the landlord for any loss sustained over the residue of the term. Such a claim was held not provable in an equity receivership, (see the opinion of Judge Mack hereto annexed at page 53) and in bankruptcy in the well reasoned opinion of District Judge Patterson in the *Wise Shoe* case, *supra,* at page 19.

Obviously the cases now before this court fall within Classes "C" and "D", and for the reasons above indicated, these particular leases give rise to no provable claim in bankruptcy because the parties have deliberately contemplated bankruptcy and have provided what the remedy in the event bankruptcy shall be, and just how and when the claims shall be admeasured.

Whether or not a covenant can be drawn within the principles of *Kothe* and *Filene* cases which would give rise to a provable claim in bankruptcy is not presented by the record in these cases. Perhaps a covenant to the effect that upon bankruptcy a lease shall *ipso facto* terminate and the tenant shall be liable for the difference between the reserved rent discounted and the market value of the lease, would be a provable claim. That question is not here. Furthermore, it is not believed that the landlords would in general exact such a covenant for they do not desire that leases should terminate *ipso facto* upon bankruptcy. They prefer to reserve an election and to determine their course after bankruptcy; and they prefer after such election to have the tenant's covenant despite its bankruptcy to pay at the end of each month or at the end of the term the actual damages sustained rather than to have a present claim based upon present speculation as to future damages. In the event of composition or reorganization their position under such a covenant would be extremely desirable. In other words, they have preferred that the

liability of the tenant shall continue after bankruptcy, subject to their option to terminate the lease, rather than to gamble upon the receipt in many cases of a small dividend and the dischargeability of the obligation. They should be held to their bargain. Having deliberately exacted and accepted such a covenant, they cannot, as is so forceably pointed out in the opinions above referred to, now because of present conditions, seek by ingenious argument to avoid the very results of their own exactions.

Validity of the Covenants for Damages.

The question must not be overlooked, however, as to whether the instant covenants are valid, and if invalid the effect thereof.

The question is whether these covenants are contrary to public policy in that they attempt to keep alive obligations which would otherwise be discharged upon the reentry of the premises by the landlord, or putting it another way, whether they provide an unlawful penalty for going into bankruptcy.

Discharge in bankruptcy releases a bankrupt from his provable debts (Bankruptcy Act Section 17). There is authority to the effect that it would be repugnant to the purposes of the Bankruptcy Act to permit the circumvention of its object by the simple device of a clause in the agreement out of which a provable debt springs stipulating that a discharge in bankruptcy will not be pleaded.

Federal National Bank v. *Koepel,* 253 Mass. 157;
In re Weitzen, 3 Fed. Supp. 698 (S. D. N. Y.).

It is believed that this salutary principle is inapplicable to the present situation, and even if applicable cannot give rise to a provable claim, for the following reasons:

The existence and provability of claims is determined as of the date of the filing of the petition. At that time, the tenant is in possession. The tenant if he sees fit may remain in possession and pay unless the landlord reenters under the covenant. Accordingly, it is the reentry under

the covenant, after the filing of the petition which gives rise for the first time to the obligation to pay damages. This obligation did not exist at the time of the filing of the petition, and accordingly was not a provable or dischargeable claim. If the bankrupt sees fit despite his discharge from provable debts to assume such an obligation, he is not running counter to the policy underlying the bankruptcy law. See *Zavelo* v. *Reeves, supra,* page 10.

Furthermore even if the covenant to pay damages after reentry to be measured and paid at the end of each month or at the termination of the lease is for any reason held void, nevertheless the position of the petitioners is not improved. The invalidity of the express covenant could not in any event result in an *implied* covenant not to go into bankruptcy so as to give rise to a provable claim. See *Miller* v. *Schloss,* 218 N. Y. 400, 406, *supra.*

Conclusion of Point II.

It is submitted, therefore, that it has been shown that petitioners had no provable claim upon the filing of the bankruptcy petition for the following reasons:

(a) The express covenants of the parties preclude a consideration of the question whether under the doctrine of the *Chicago Auditorium* case, there is an implied covenant in a lease against going into bankruptcy which is breached by the bankruptcy and which gives rise to a present claim.

(b) The express covenants of the parties do not give rise to a present provable claim because contractually the parties have agreed that there shall not be a present provable claim at the time of bankruptcy or reentry, but that the actuality of the future and not the prophesy of the present shall determine what if anything shall be paid by the tenant.

(c) That bankruptcy cannot constitute an anticipatory breach of the covenants to pay damages which become effective only upon bankruptcy.

POINT III.

If the petitioners' proof of their claims is not barred by the covenants of the leases, nevertheless petitioners' claims are so contingent in existence and amount that they are not provable.

It must be emphasized that the claims here involved are not for future rent but, inasmuch as the landlords have re-entered, for future damages.*

> *Hermitage Co.* v. *Levine*, 248 N. Y. 333;
> *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28;
> *Grommes* v. *St. Paul Trust Co.*, 147 Ill. 634, 642.

There is no question here of provability of contingent claims because the parties have expressly covenanted as to when and how the damages if any are to be ascertained in the event of bankruptcy and re-entry by the landlord. The time for such ascertainment had not arrived at the time of bankruptcy. If the Court now should permit proof of this claim it would be attempting to measure the damages by a method contrary to that agreed to by the parties. And this the Court should not do as pointed out *supra* in Point II.

If however the foregoing argument be deemed unsound then nevertheless the claims here sought to be proved are contingent. The only possible claims which the petitioners had at the time of bankruptcy were those arising upon the covenants which survived re-entry. But at that time these claims were contingent both in existence and valuation. At the time of bankruptcy they were contingent in existence on the occurrence of two events 1) re-entry by the landlord 2) the *actual* (not the presently estimated) amount of rent thereafter received for the leased property for the balance of the term, which amount deducted from the reserved rental would measure the *actual* future loss, if any. They

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* If it were a claim for rent, *qua* rent, and were provable as such, the balance of the term would belong to the trustee in bankruptcy. *Wilson* v. *Penn. Trust Co.*, 114 Fed. 742; *Lamson etc. Co.* v. *Bowland*, 114 Fed. 639; *McCall Co.* v. *Deuchler*, 174 Fed. 133.

likewise were contingent as to valuation on the occurrence of these same events.

In *Re Merrill & Baker,* 186 Fed. 312 approved in *Maynard* v. *Elliott,* discussed hereafter at page 44, the claim was deemed contingent because it was wholly uncertain at what price the collateral which was the primary fund out of which the debt was to be paid, could be sold. In the present case the claim was likewise contingent at the time of bankruptcy because it was wholly uncertain whether the lessor would re-enter and if so, at what price the leased premises would *actually* re-rent over a period of years.

It now will be shown:

(A) Congress did not intend claims contingent in character to be provable under the Act of 1898; and

(B) Under the decisions of this Court, such claims so contingent are unprovable.

A.

Congress in enacting the Bankruptcy Act of 1898 did not intend to make contingent claims, such as here involved, provable in bankruptcy. The express provisions for the proof of contingent claims in the 1867 Act were omitted from the Act of 1898 and cannot be put back by construction.

This question does not seem to have been considered in any case. It "lurked in the record", but was not argued or decided in *Maynard* v. *Elliott, infra.* In *Webster* v. *Fall,* 266 U. S. 507, 511, this Court said:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

A careful consideration of the provisions of the Act of 1898 in connection with the provisions of the Act of 1867 must lead to the conclusion that only claims absolutely owing at the time of the filing of the petition, although then not payable, are provable under the 1898 Act. An analysis of the sections of the two Acts with respect to what claims are provable will reveal that the 1898 Act has taken over

all provisions from the 1867 Act with respect to what claims are provable, except the provisions of the 1867 Act providing for the proof of contingent claims.

The Act of 1867 is found in 14 Stat. 525, Chapter 176, and the provision as to what claims were provable is found in Section 19 thereof. Thereafter this Act of 1867 was included in the Revised Statutes of 1873, and Section 19 of the Act of 1867 providing for provable claims appears as Sections 5067 *et seq.* of the Revised Statutes. The applicable provisions of the Revised Statutes read as follows:

> "Sec. 5067: All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy and all debts then existing but not payable till a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate."*
>
> "Sec. 5068: In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in dividends, if the contingency happens before the order for final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such man-

*Originally in Sec. 19 of the Act of 1867 before being revised, the three sentences of Sec. 5067 each appeared as a separate paragraph. The first two sentences constituted paragraphs one and two of Sec. 19 and the third sentence appeared as the eighth paragraph of Sec. 19. When the revision was made at the direction of Congress, the revisers apparently thought that the sense of these three sentences required that they be placed together.

ner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

"Sec. 5069: When the bankrupt is bound as drawer, endorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract or for any debt of another person, but his liability does not become absolute until after the adjudication in bankruptcy, the creditor may prove the same after such liability becomes fixed, and before final dividend is declared."

"Sec. 5070: Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, discharge of the whole shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders."

"Sec. 5071: Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Sec. 63 of the Act of 1898 reads as follows:

"a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and

which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less cost incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Comparison of these two Sections makes it clear that Section 63(a) (1) and (4) and Section 63(b) are substantially the same as the provisions of Revised Statutes, Section 5067. This is made clear when the said Sections are put in parallel columns as follows:

Act of 1867. Revised Statutes, Sec. 5067, 14 Stat. at Large 525, c. 176, Sec. 19.	Act of 1898. 30 Stat. at Large 562, Sec. 63.
"All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable till a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken	"a Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate in interest upon such as were not then payable and did not bear interest; * * *; (4) founded upon an open account or upon a contract expressed or implied; * * *.

or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate."

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 63(b), of course, does not enlarge the class of claims provable under Section 63(a), but merely provides for a method of liquidation, and the only claims under Section 63(a) that require liquidation are those provided for in clause 4. See *Schall* v. *Camors*, 251 U. S. 239. As a consequence Section 63(b) and Section 63(a) (4) really should be read in conjunction as follows "unliquidated claims against the bankrupt, founded upon an open account, or upon a contract express or implied, may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

It therefore clearly appears from the foregoing that the second and third sentences of Section 5067 were substantially carried over into the Act of 1898 and are now to be found in Section 63(a)(4) and Section 63(b). The only changes made in the transition were two: first, the second sentence of Section 5067 providing for the proof of claims in conversion was replaced by the provision in Section 63(a) (4) for claims founded upon "implied contract", i. e., claims in quasi contract based upon a waiver of the tort (*Schall* v. *Camors*, 251 U. S. 239); and, second, that the words "unliquidated damages" in the third sentence of Section 5067 were replaced by the words "unliquidated claims" in Section 63(b). The first of these changes re-

quires no comment because it is clear that an action upon implied contract arising from waiver of the tort is the same as an action for unliquidated damages for a converted chattel. The second of these changes obviously was made because required by the first change. There cannot be a claim for unliquidated "damages" based on an implied contract and therefore Congress used the word "claims".

It is next to be pointed out that the provisions of Section 5070 providing for the proof of claim by sureties in the name of the creditor are now found in Section 57(i) of the 1898 Act and General Order XXI, subdivision 4.

It thus appears that there have been omitted from Section 63 of the present Act any provision at all equivalent to the provisions of Sections 5068 and 5069 of the Revised Statutes providing for the proof of contingent claims; and there have also been omitted the provisions for the provability of a proportionate share of rent as found in R. S. 5071.

The conclusions from these deliberate inclusions and omissions are entirely clear; it cannot be doubted but that the able lawyers who had the question of a new Bankruptcy Act under consideration for years prior to its enactment and who had knowledge of the provisions of the 1867 Act and the provisions thereunder, deliberately omitted the express provisions for the proof of contingent claims as found in the 1867 Act. Moreover the Bankruptcy Law of Great Britain then in force and all prior ones had contained specific provisions with respect to contingent claims and the precise method of their ascertainment and these had been strictly construed. 46 and 47 Vict. C. 57 (1883); *Williston,* Cases on Bankruptcy (2nd Ed.), note pp. 480, 481, 32 and 33 Vict. C. 71 (1869).

Congress having copied into the Act of 1898 the provisions for the proving of claims on contract; having provided for the proof of implied contracts as the equivalent for the proofs of claim in tort arising out of unjust en-

richment; having provided for the liquidation of unliquidated claims arising upon contracts; and having deliberately omitted all reference to contingent claims, it cannot be successfully argued that it was intended by *mere implication* to extend the meaning of the language thus substantially copied from the earlier Act to include contingent claims. Having omitted all reference to contingent claims, Congress did not intend to "smuggle in" those very provisions "by muffled words."*

The question as to the effect of the deliberate omission from the 1898 Act of provisions found in the 1867 Act has been before this court in several cases. Thus in *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, was involved the question of the right of a creditor to prove a claim after innocently receiving a preference, without returning the property thus received. The court first quoted the provisions of the Act of 1867 which stated that any person who accepted a preference having reasonable cause to believe that the same was made or given by the debtor contrary to the provisions of the Act could not prove the debt, until the preference was surrendered. And the court italicized the following words "having reasonable cause to believe that the same was made by the debtor". The court then said at page 448:

> "The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. **Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued usually its words are, and an omission of the words implied an omission of the purpose.** This rule we lately applied in Bardes *v.* First National Bank of Hawarden, 178 U. S. 524. In that case, in determining whether the jurisdiction of the Circuit and District Courts of the United States was con-

*See Mr. Justice Holmes in *Davis* v. *Pringle*, 268 U. S. 315.

> current with the state courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841* and 1867 were compared with that of 1898, and from the omission from the latter of certain provision of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: 'We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.' ''

Language more appropriate to the present situation could not be conceived.

See, too, *Davis* v. *Pringle*, 268 U. S. 315, which discussed the effect of changes in the 1898 from similar provision in the Act of 1867 with respect to priority to be accorded debts due the United States and similarly refused to incorporate by implication and construction into the 1898 Act provisions expressly set forth in the 1867 Act but not brought over into the Act of 1898.

One further fact is to be emphasized. Section 5068 particularly provided that the creditor may at any time apply to the court to have the present value of the contingent debt or liability "*ascertained* and liquidated" and *in addition* provided for the liquidation of damages in Section 5067 on presently due claims on contract. The Act of 1867 thus made a distinction between the ascertainment and liquidation of claims and provided that contingent claims should be "ascertained" whereas presently due claims for damages should be liquidated. The Act of 1898 however provides only for the liquidation of claims and that is the same provision which was already in the 1867 Act in addition to the provision for ascertainment and liquidation. As said in *Guarantee etc. Co.* v. *Title Guaranty & S. Co.*, 224 U. S. 152, all of these changes were not "inadvertent".

*The Bankruptcy Act of 1841 also contained provisions for the allowance of Contingent Claims. (5 Stat. 440, Section 5).

In addition, Congress must have known that Judge Lowell, who was probably the most learned of the Federal Judges interpreting the Act of 1867, had held that claims for rent and damages under leases were not provable despite the general provisions for the proof of contingent claims in the Act of 1867.

Ex-parte Houghton, 1 Lowell 554.

They also knew that as early as 1882 Judge Lowell himself had prepared a bill specifically providing for the allowance of claims growing out of leases, and yet no provision of any kind covering this subject was included in the 1898 Act.

See

H. R. Rep. 65, 55th Congress, Second Session, page 28 (1898);

See

The Lowell Bill, S. 1382, introduced in the 47th Congress, Second Session in 1882, and set forth in 14 Congressional Record, pp. 43-49.

At page 28 of the said House Report 65, it was stated:

> "When the agitation of a new bankrupt law began some years ago, Judge Lowell of Massachusetts drew a bill which attracted the general attention of the country. In the West and South, however, it was believed to be too severe in some of its views. Out of the discussion among friends of bankruptcy legislation grew the Torrey bill. Judge Jay L. Torrey, a Western man, gave the subject special attention, and presided over three national conventions held to discuss and perfect a bankruptcy bill. His bill was submitted to many jurists and lawyers East, West and South, and the result was a bill believed to be free from the severe features of former laws and other proposed legislation."

The Lowell Bill of 1882 above referred to and with which Congress was evidently familiar contained the fol-

lowing provision with respect to what claims were provable:

> "Sec. 60: That the following debts and liabilities, and no others, shall be provable in bankruptcy: * * *; all damages suffered by reason of the rejection by the trustee of a lease, as hereinafter provided; * * *.
>
> "LEASES—RENTS.
>
> "Sec. 61: That the bankrupt shall not be entitled to the benefits nor be bound by the covenants or engagements of any lease held by him at the time of his bankruptcy, but such lease shall be deemed to be surrendered so far as he personally is concerned. The trustee may decline the lease at any time, notwithstanding that he may have endeavored to sell the same, or have exercised acts of ownership in respect thereto: *Provided,* That the landlord or any creditor may, in writing, require him to elect, within twenty days after such notice, whether to accept or decline the same; and the failure to accept within such time shall be deemed a declination. When a lease is declined, the landlord may have any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in bankruptcy. Such declination shall not affect any right of the trustee to deal with fixtures belonging to the bankrupt."
>
> "And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same, or any part thereof, may if the creditor fails or omits to prove such debt, prove the same in the name of the creditor, if known, if not, in his own name, and the Court shall take care that the dividend is so paid as to diminish the original debt."

The reports of the committees in Congress have been examined and beyond the extent indicated throw no light on the question. They do not show that in using the words "founded on open account or on contract express or implied", Congress intended to re-enact by indirection and by implication the express provisions of the 1867 Act with

respect to contingent claims, and by those general words to "smuggle in" every possible kind of a contingent debt expressly provided for, both as to provability and method of "ascertainment", in the 1867 Act.

As said by Mr. Justice Holmes in the *Filene* case, 245 U. S. 597, 601:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe."*

Finally it is to be noted that consistent with its omission of contingent claims from Section 63 Congress provided in Section 57*a* that proofs of debt shall set forth "that the sum claimed is justly *owing* from the bankrupt to the creditor."

In view of the foregoing, it is submitted that Congress in 1898 deliberately omitted the provisions for proving contingent claims contained in the 1867 and 1841 Acts and that these provisions, to use the language of the *Pirie* Case, 182 U. S. 438 cannot be put back by construction. Contingent claims such as are here involved were not intended to be either provable or dischargeable under the Act of 1898.

B.

1. The decisions of this court and the lower Federal courts clearly establish that claims which will become due and enforceable only upon the occurrence of a contingency not reasonably certain to occur are not provable.

Until the recent case of *Maynard* v. *Elliott*, 283 U. S. 273, no one could have contended that claims such as those of petitioners were provable. Petitioners in effect contend however that the *Maynard* case makes all claims founded upon a contract provable under clause 4 of Section 63a, regardless of whether it is uncertain at the time of the bankruptcy whether the claim will ever mature and become pay-

*Another application of this principle is found in the cases of *Davis* v. *Pringle*, 268 U. S. 315 and in *Price* v. *U. S.*, 269 U. S. 492. In the former a debt due the United States was denied priority in bankruptcy whereas in the latter such a debt was granted priority in an equity receivership.

able and enforcible. Under this interpretation, *Maynard* v. *Elliott* was certainly an astounding departure from all the past rulings of this court under the 1898, 1867 and 1841 Acts. This interpretation is unsound, however. *Maynard* v. *Elliott* did not lay down any such broad rule. Indeed *Maynard* v. *Elliott* is entirely consistent with the previous decisions of this court.

After all, claims absolutely owing though not payable are contingent in a certain sense; they are contingent on the element of time. This contingency, however, since it is one certain to occur, has specifically been declared by Congress to be unimportant and one to be disregarded. (see Sec. 63(a) 1.)

Claims are, however, frequently contingent on some event other than time. Where the occurrence of such contingencies is entirely within the control of the creditor, it is exactly similar in nature to the contingency of time. For all practical purposes such a contingency like the contingency of time, is certain to occur because the creditor, it may safely be assumed, will see that it does occur. So also whether a claim will become absolutely due and payable frequently depends on the occurrence of some other contingency which experience shows is for all practical purposes certain to occur.

Where the enforcibility of claims is dependent upon a contingency so like in nature to the contingency of time, there is no legal or practical reason for treating it differently from a claim contingent on the element of time. There is certainly no reason to suppose that Congress meant to draw a distinction between debts certain to occur, which are dependent upon the contingency of time, and debts certain for all practical purposes to occur which are contingent on some other element.

As a consequence this court in *Williams* v. *Fidelity Co.*, 236 U. S. 549, held a claim provable because it was reasonably certain so to become, though at the time of bankruptcy it was neither due nor payable; and this even though the contingency was not within the control of the creditor. In that

case, a surety's claim against a bankrupt was held provable and discharged even although the surety agreement was one of indemnification and the surety had not paid the creditor at the time of the filing of the petition. In that case, however, it was certain at the time of the filing of the petition that the surety would have an enforceable claim against his bankrupt principal because his principal had before bankruptcy breached the principal obligation and was then insolvent and experience shows that creditors whose principals are insolvent usually pursue the surety.

Maynard v. *Elliott,* supra, merely marks another application of this same narrow doctrine. The claim there was one contingent upon the occurrence of something entirely within the creditor's control. The claim was one which would become enforcible and payable at the election of the creditor. As revealed by the record,* the *maker* of the note was already *discharged in bankruptcy* at the time of the filing of the petition in bankruptcy against the indorser and all that the creditor would have to do in order to make his claim enforceable, would be to give notice of dishonor and protest.** It is true, of course, that the opinion does not disclose specifically the fact that the maker was already insolvent, but that the court was aware of this fact and was merely applying the narrow doctrine stated above is amply clear from the opinion which states that the contingency of notice of dishonor was within the control of the creditor and *implies that this was the only contingency preventing the claim from maturing.* Had the Court not been aware of the maker's insolvency, it is little likely that it would have said that the creditor's claim was certain to become enforceable upon the giving of notice of dishonor and presentment. It is submitted moreover that the court did not mean to hold that the possible insolvency of the maker at the maturity of say a ten-year note who was entirely solvent at the time of the indorser's bankruptcy was a contingency within the creditor's control.

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* See Transcript of Record of that case at pages 11, 17 and 26.
** Even this the Court finally said was unnecessary, 283 U. S. at 279.

That the Court in *Maynard* v. *Elliott* recognized the narrow limitation of the doctrine which it was expounding is made even more clear from the following quotation:

> "That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's *obligation* may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. *In re Merrill & Baker,* 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. *Riggin* v. *Magwire,* 15 Wall. 549." See 273 U. S. at 278.

The Court thus made it clear that claims contingent in existence upon the occurrence of events not reasonably certain to occur because not within the control of the creditor or because their occurrence is shown by experience to be too fortuitous, are not to be treated the same as debts absolutely owing but not payable because dependent upon the contingency of time. Such claims, said the court, are not provable and the cases cited by it amply bear it out.

In *Merrill & Baker,* supra, an obligation was secured by collateral and the creditor agreed to pay the difference between the face of the obligation and the actual amount realized from the sale of the collateral, if not paid by the bankrupt. This claim was held contingent and not provable and this Court in the quotation above said that this was so because the contingency was beyond the control of the creditor and dependent upon an event so fortuitous as to make it uncertain whether liability would ever attach. As pointed out above the claims in the cases at bar are equally dependent upon a fortuitous event namely, the amounts for which the leased premises will be actually re-rented during the balance of the term.

So also the claim in *Riggin* v. *Magwire,* 15 Wall. 549, which arose under the Act of 1841 (which specifically provided for the proof of contingent claims) was held not prov-

able because it was not reasonably certain at the time of the bankruptcy whether it would ever become due and payable. In that case the creditor's claim would become payable only if the bankrupt's wife survived the bankrupt. This Court held this claim not provable because at the time of bankruptcy it was unpredictable whether the wife would survive.

Another case which the court might well have cited for this same proposition is *Dunbar* v. *Dunbar,* 190 U. S. 340. There the bankrupt would become liable only if his former wife remained single and, therefore, at the time of bankruptcy it was impossible to predict whether the bankrupt would ever become liable. The court therefore held that the claim was not provable and therefore not dischargeable.

So in this case whether the petitioner's claims will ever become due and payable was unpredictable at the time of bankruptcy. There was no reasonable certainty that even if there was a reentry there would be an actual loss, inasmuch as under the covenants here the existence of an actual loss would depend upon the actual amounts at which the properties would actually be relet.

2. The decisions of this Court and the lower courts also clearly establish that claims which are speculative in amount are not provable. The bankruptcy courts have always refused to substitute their present prophecy of the future for the actuality of the future.

In *Maynard* v. *Elliott, supra,* the Court took particular pains to point out that if a claim was so speculative at the time of the bankruptcy that there could be no valuation, it was not provable. It stated that the amount of a claim might be dependent upon the occurrence or non-occurrence of contingencies and that if it was impossible to predict whether the contingency would occur, the court would not speculate on the possible amount of the claim which the creditor might have. It said:

> "Or, the contingency may be such as to make any *valuation* of the claim impossible, even though

> liability has attached. Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar* v. *Dunbar, supra;* see *Atkins* v. *Wilcox*, 105 Fed. 595." 273 U. S. at 278.

The case cited by the court, *Dunbar* v. *Dunbar, supra,* is directly in point and decisive of this case. As already pointed out the claim there was contingent in existence on whether the wife would remain single. It was also therefore contingent in amount because the amount of the claim would depend on how long the wife remained single and that was unpredictable at the time of bankruptcy.

Petitioners contend that courts often exercise and pass judgment on the future acts or events in estimating damages and that there is no reason why they cannot do the same here. That same argument was applicable in *Dunbar* v. *Dunbar* and in the other cases analyzed above. It might there have been argued that juries frequently assess damages for mental suffering and that that is more speculative than estimating how long and whether a woman is likely to remain unmarried. There are statistics on that. Indeed in *Dunbar* v. *Dunbar* the argument was made that in England a court had already made an estimate as to how long a woman would remain unmarried.

Despite this the court refused to hold the claim in the *Dunbar* case provable. There must have been a reason and it is submitted that it is this. The cases to which petitioners point as analogy, as being cases where the courts have exercised their judgment for the future, are cases where plaintiff had a present enforceable cause of action. In such case, a court has no alternative but to use its estimate of the future. Plaintiff possessing a present cause, the court in all justice must guess. Indeed if it does not the Statute of Limitations may run. But when he has not a present but a future cause, courts refuse to guess. They refuse to substitute their prophecy of the future for the actuality of the future and remit claimant to that actuality.

This Court refused to make such a prophecy in *Dunbar* v. *Dunbar* and in the cases analyzed above.

No case has been found in this Court where a claim contingent both as to existence and valuation was held provable. *Dunbar* v. *Dunbar* and *Riggin* v. *Magwire*, both *supra*, held that claims so doubly contingent must be remitted to the actuality of the future and are neither provable nor dischargeable. See also *In re Merrill & Baker*, 186 Fed. 312.

Conclusion to Point III.

It is submitted, therefore, assuming the court will reach this question despite the contention that these claims are contractually barred, that it has been shown that (1) Congress in enacting the Bankruptcy Act of 1898 and deliberately omitting the provisions respecting contingent claims contained in the 1867 Act and the British Act then in force did not intend contingent claims of this character to be provable and dischargeable and (2) that no decision in this court holds otherwise, but on the contrary that the decisions in *Merrill* v. *Baker* and *Dunbar* v. *Dunbar* clearly recognize that claims of this character are not provable.

POINT IV.

Petitioners' Brief.

The elaborate brief of the petitioners, with its wealth of citations, fails to discuss and meet the essential points involved in these cases. The brief in reality is based on the rather plaintive argument that claims for damages for the loss of future rents ought to be provable in bankruptcy, as the petitioners see the situation, and that therefore a way must be found to make them so. To reach their desired result, petitioners boldly ask this court to usurp the functions of Congress and to legislate amendments into the Bankruptcy Act so as to make it as broad and comprehensive as the provisions of the English Bankruptcy Act in

effect prior to 1898 (which act Congress did not deem it wise to follow) or as broad and comprehensive as the amendments tentatively proposed by the Committee referred to at pages 6 and 7, supra.

Petitioners ask the court to ignore—

(1) The solemn and unambiguous covenants of the parties fixing their rights;

(2) The law of leases established for centuries;

(3) The settled rule of construction of the Bankruptcy Act of 1898 resulting from the omission of the provisions of the Act of 1867 and the clear limitations upon the provability of claims as set forth in Sections 63 and 57 (a) of the 1898 Act.

(4) The applicable cases respecting contingent claims.

Having thus blithely brushed aside history, precedent and express provisions of the present statute, petitioners conclude that the court below erred—

> "in holding that the claim for damages for loss of future rent was not as a matter of law a provable debt."

Stripped of verbiage, the gist of their argument is this:

All the express covenants of the leases providing for forfeiture, reentry and damages are to be ignored and the following new rule established. If a tenant in possession of real estate becomes a bankrupt, the landlord in the absence of statute or express covenant may reenter the leased premises after bankruptcy and nevertheless have a provable claim for damages against the bankrupt and his estate. Perhaps that should be the law. If so, Congress will act in the future (See possible legislation, p. 7, supra).

Throughout their argument, however, petitioners ignore the fact that they *have* reentered and taken the property and thus terminated the lease. They urge that the situation is analogous to a breach of an executory contract by anticipation or otherwise. The argument, however, does not bear analysis. It ignores the nature of leases and the respective rights of the parties growing therefrom.

At common law, covenants of leases were independent and even actual failure to pay rent did not terminate the lease.

2 Tiffany on Landlord and Tenant (1910) p. 1364.
2 Williston on Contracts (1920) §890.
Michaels v. *Fishel,* 169 N. Y. 381.
Thompson-Houston Electric Co. v. *Durant Land Improvement Co.,* 144 N. Y. 34, 44.

A fortiori, therefore, bankruptcy was held not to terminate the lease. See Judge Mack's opinion in *Western Electric Co.* v. *Powers Accounting Co.,* annexed hereto at page 54.

Furthermore, ignoring for the moment the covenant of indemnification, reentry by the landlord upon breach of a lease pursuant to a covenant in the lease, operates both at common law and by the laws of New York today as a termination of the lease and *relieves the tenant and his estate from all claims for damages.*

1 Tiffany on Landlord and Tenant (1910) p. 1174.
Gardiner v. *Butler Co.,* 245 U. S. 603.
Hall v. *Gould,* 13 N. Y. 127.
McCready v. *Lindenborn,* 172 N. Y. 400.
Sutton v. *Goodman,* 194 Mass. 389.

Moreover in claiming a right at common law to terminate, reenter and claim for damages, not only do petitioners ignore the covenants of the parties and the law of leases stated above, but they also demand that the bankruptcy court treat them better than other creditors.

A lease is something more than an executory contract. It is, as stated by Judge Mack in the *Western Electric Co.* case a conveyance of an interest in real property, a chattel real. See infra at page 54. A lease is, therefore, like a contract, partially executed on one side, like a contract for the sale of personalty or realty in which the seller has transferred title and possession and the purchaser has not yet paid the purchase price. Upon repudiation by the buyer, the seller of personalty in the case supposed above could

sue for the purchase price if the time for performance had arrived.

3 Williston on Contracts (1920) § 1458;
1 Williston on Sales (1924) § 511.

Perhaps he also could rescind.

Ankeny v. *Clark*, 148 U. S. 345.

The seller of realty might perhaps rescind or sue for damages.

3 Williston on Contracts (1924) § 1456.

But neither could have both.

A creditor cannot both rescind, obtain restitution and sue for damages. He must elect.

Restatement of the Law of Contracts, § 384.
Joannes Brothers Co. v. *Lamborn et al.*, 237 N. Y. 207.
Clark v. *Kirby*, 243 N. Y. 295.
Cf. Grymes v. *Sanders et al.*, 93 U. S. 55.

There is no reason why landlord should be treated any differently and be permitted in effect both to rescind and claim damages.

It must also be noted that there cannot be an anticipatory breach of a lease under the law of New York.

McCready v. *Lindenborn*, 172 N. Y. 400;
Cf. Kelly v. *Security Mutual Life Ins. Co.* 186 N. Y. 16;
Cf. Nichols v. *Scranton Steel Co.*, 137 N. Y. 471.

Under the law of Nebraska the doctrine of anticipatory breach of any contract, much less a lease, is repudiated.

Carstens v. *McDonald*, 38 Neb. 858;
Following *Daniels* v. *Newton*, 114 Mass. 530.

The law of the Federal Courts, both of this Court and the lower Federal Courts is the same as to unilateral contracts.

Roehm v. *Horst*, 178 U. S. 1, 17;
Operators Oil Co. v. *Barbre*, 65 Fed. (2d) 857.

See also Restatement of the Law of Contracts §318.

The above rules of law which apply in the case of repudiation of the obligation to pay rent by a solvent tenant likewise apply in bankruptcy.

In re *Pettingill & Co.*, 137 Fed. 143 quoted with approval in *Central Trust Co.* v. *Chicago Auditorium Ass'n.*, 240 U. S. 581, 592. See page 24 supra for quotation.

The application of the foregoing principles of law to the instant cases leads to the following conclusions: Even if the covenants of the leases can be disregarded (of course they cannot be), nevertheless petitioners' claims are not provable because (1) reentry has precluded any claim for damages, and (2) even if there had been no reentry petitioners would have no claim for damages.

POINT V.

Section 74 of the Bankruptcy Act added in 1933 does not make the claims provable.

That section clearly applies only to claims filed in a debtor's proceeding for composition or extension. Furthermore that section provides that a claim for future *rent* shall constitute a provable debt and shall be liquidated under Section 63(b) of the act. The claims in the present cases are not for future rent but are for *damages*. If they were for future rent the balance of the term would pass to the Trustee in Bankruptcy as an asset of the estate. Here this cannot happen, for the landlords have reentered and are seeking damages. Furthermore the section is not made retroactive and could not be made so as to enlarge the classes of provable debts because it would unlawfully interfere with vested rights—namely the vested right in rem of a creditor at the time of the filing of the petitions long before the Statute was enacted. This vested right

was a lien upon such part of the property of the bankrupt as the amount of the creditor's provable claim bears at that time to the entire amount of the provable claims.

Board of Commissioners v. *Hurley*, 169 Fed. 92;
Chemical Bank v. *Armstrong*, 59 Fed. 372, 378;
Sexton v. *Dreyfus*, 219 U. S. 339, 345.

POINT VI.

Conclusion.

The underlying theme of petitioners' argument is the alleged injustice of the present law. That there is such injustice is denied. Injustice there might really be to creditors with certain claims against a bankrupt if these speculative claims were to be proved.

In any event the salutary principle enunciated by this Court in *New Jersey* v. *Anderson*, 203 U. S. 483, 490, is peculiarly apposite here:

> "But considerations of this character, however properly addressed to the legislative branch of the government can have no place in influencing judicial determination. It is the province of the Court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress."

The judgments of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

GODFREY GOLDMARK,
as *Amicus Curiae* on behalf of
IRVING TRUST COMPANY as
Trustee in Bankruptcy of McCrory Stores Corporation.

Opinion of Mack, J.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTERN ELECTRIC COMPANY, INCORPORATED, Complainant, *against* POWERS ACCOUNTING MACHINE COMPANY, Defendant.	E. 19—150

CLAIM OF PREN-BROOK CORPORATION.

MEMORANDUM OPINION.

MACK, Circuit Judge:

Defendant is lessee under three leases made before the completion of the building,—two for ten years from such completion and one for ten years from September 15, 1920. Rent was payable annually or quarterly in advance.

Receiver herein was appointed on October 18, 1920, on defendant's confession of insolvency and consent thereto. By agreement, with express reservation of lessor's right to terminate after October 8, 1921, under the clauses of the lease permitting termination in the event of the appointment of a Receiver of the tenant, October 8, 1920, was fixed as the date of the completion of the building. Rent for one year was paid. On October 8, 1921, the Receiver disaffirmed the leases without the lessor's consent; thereupon lessor, without accepting a surrender, took possession. Expressly

without prejudice to any claim, except to give credit for rent paid, lessor leased a portion only of the space to the Receiver from October 8, 1921 to October 1, 1922. Another portion was rented to another party for five years.

The claim as filed is for the rent reserved after crediting rents received or reserved under the relettings.

The leases provided:

> "That if at any time during the term above specified, the lessee should become insolvent, or a receiver of the lessee's property should be appointed, then in each of such cases it should and might be lawful for the lessor, at the lessor's election, into and upon the demised premises or property, or any part thereof, in the name of the whole, by process of law or otherwise, to enter and to have, hold, possess and enjoy the same, and to terminate said lease; and that the lessee in such case should be liable for any loss or deficiency of rent which might be suffered by the lessor during the remainder of the term above specified."

A lease of an interest in real property is the creation or grant of a chattel real; rent reserved is compensation for the enjoyment of the interest during the period for which the rent is paid or is payable; neither insolvency nor bankruptcy of the lessee affects the term created except as the title thereto, unless rejected, becomes the property of the Receiver or Trustee and the latter thereby is subjected to payment of the reserved rent. If the interest be not accepted by Receiver or Trustee either at once or retroactively after a period during which the advisability thereof is under consideration, the interest with the rental obligation remains in and on the insolvent or bankrupt. Insolvency or bankruptcy of itself creates no breach anticipatory or otherwise of the rent obligation because it does not terminate the leasehold estate.

In re Mullings Clothing Co., 238 Fed. 58, does not purport to and does not overrule *In re Roth & Appel*, 181 Fed. 667; it distinguishes the effect of dissolution from that of

the bankruptcy of a corporation, in that the former ends the corporation's existence: therefore, it is held to effectuate an anticipatory breach of the leasehold estate.

Neither bankruptcy nor equity proceedings under a creditors' bill legally ends the corporate life; indeed, it does not necessarily end its business career; a composition or reorganization or payment in full may be effectuated with or without a balance of assets for the corporation. There is no legal difference in this respect between a corporate and a personal lessee.

The parties may, however, incorporate an executory contract in the lease; that contract may, like other executory contracts, be broken by anticipation; such a breach may, under circumstances, give rise to a claim provable either in bankruptcy or in equity proceedings; it may indeed be deemed retroactive as of the date of the proceedings even if actually created by the subsequent exercise of an option exercisable because of or on the bankruptcy or appointment of a Receiver.

That the claim was contingent, uncertain or unliquidated at that time is not fatal to its proof, at least in equity proceedings, provided only that it can be made absolute, certain and liquidated within a reasonable time so as not to impede the settlement of the estate.

Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597.

If the leasehold interest, pursuant to some reserved right, is terminated on or because of the insolvency or receivership, the obligation to pay rent as such necessarily ceases, whatever right to damages may arise because of some contractual provisions incorporated in the document; if the leasehold interest is not terminated, the obligation to pay rent when and as it accrues remains on the lessee; in neither case, therefore, can a claim against the bankrupt or insolvent estate for the reserved rent as such be established.

Furthermore, if there be no contractual or statutory provision for damages on such a termination, there is no further liability either of the lessee or of the insolvent or bankrupt estate.

Gardiner v. *Butler,* 245 U: S. 603.

If, however,-there be a contractual provision for damages on such a termination and the measure of those damages fixed by the agreement be the difference at the time of a termination between the market value of the lease and the discounted value of the rents reserved, and if the termination be reasonably prompt so as to enable a liquidation of the amount before the time for filing proofs shall have expired, then at least in equity proceedings such a claim is provable.

Filene v. *Weed,* supra.

But, if as in the present case, on such a termination a lessee becomes liable not for an amount then ascertainable but for the entire loss that the lessor may actually suffer during the remainder of the original term, inasmuch as it is clearly impossible to ascertain that loss until the original term shall have expired,—in this case about nine years,—the claim must be rejected as uncertain.

In re Roth & Appel, supra.
Penn. Steel Co. v. *N. Y. City Ry. Co.,* 198 Fed. 721, 759.

Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they have provided that on such termination, when but for the provision no dam-

ages could be claimed, the lessee "shall be liable for any loss or deficiency of rent which may be suffered."

Not only is there therefore no basis for the claim as filed for the full reserved rent, but even if it were amended so as to charge an actual termination of the lease and in respect to damages therefor to assert, contrary to the contractual provisions a right to the difference between the rents reserved and the actual rental value at the time of termination, it would have to be disallowed.

Objections sustained and claim disallowed.

April 14, 1922.

JULIAN W. MACK,
U. S. Circuit Judge.

Opinion of Wallace Macfarlane, Special Master.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E 27-141.

CHARLES H. MEARS,
Plaintiff,

against

J. M. GIDDING & CO. INC.,
Defendant.

In the matter of the claim of

JANE SCHUYLER MORSE.

REPORT OF WALLACE MACFARLANE, SPECIAL MASTER.

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Pursuant to an order of this court duly made and entered herein on the 14th day of March, 1924, by which Wallace Macfarlane was appointed special master to take testimony with respect to claims filed herein to which objection should be taken by the Receiver, and to report to this court his opinion and recommendations with reference to such claims,—

I, the said special master, respectfully report as follows:

APPEARANCES:

MESSRS. ROSENBERG & BALL (Godfrey Goldmark, Esq., of counsel) for Leo A. Price, receiver of Gidding & Co. Inc.

MESSRS. EDWARD, O'LOUGHLIN & GEORGE (Mr. O'Loughlin, of counsel) for the claimant.

On or about the 23rd day of April, 1920, Jane Schuyler Morse, of New York City, leased to J. M. Gidding & Co. Inc., a New York corporation, having its principal place of business in the Borough of Manhattan in the City of New York, certain premises, in said borough and city, known as No. 3 West 46th Street, for a term of twenty-one years commencing on the first day of June, 1921, and ending on the 31st day of May, 1941, at an annual rental of $16,000. payable in equal quarterly instalments on the first days of June, September, December and March in each year of said term. The lessee covenanted to pay the rent and all taxes, and to perform certain other obligations specified in the lease, and also to deposit $8500. in U. S. bonds as security for the performance of its covenants, and in case of any application of the securety or any part thereof to satisfaction of the lessee's covenants, it agrees to keep the security good. The lease contains, also, an elaborate covenant for continuing the liability of the lessee to pay as damages the equivalent of the difference between the reserved rental and any rentals received on reletting if, before the expiration of the term, the lease should be terminated by reentry of the landlord by summary proceedings, or otherwise, for breach of any of the conditions of the lease by the lessee authorizing such reentry, and that such damages *should be due and payable by the lessee to the lessor on the several rent days specified in the lease.* This provision for continuing liability is made applicable also by appropriate words to a termination of the lease by notice to quit "if the lessee be adjudicated a bankrupt, or make a general assignment, or take the benefit of any insolvent act." A copy of the lease is returned herewith as claimant's exhibit 2.

Gidding & Co. defaulted in the payment of the rent falling due September 1, 1923, and on September 11, 1923, $4050. of the U. S. bonds deposited as security were used to pay this instalment of rent, and the lessee failed, on demand, to keep the security good by restoring this amount.

The lessee also failed to pay the taxes falling due on May 1, 1923 amounting to $1274.10.

On October 2, 1923, a receiver of Gidding & Co. was appointed in this action. Gidding & Co., as appears from its answer, joined in the application for the receiver, and at the time of his appointment was and is insolvent.

By an order duly made and entered in this action on or about January 4, 1924, claimants were required to file their claims with the attorneys for the receiver on or before March 1, 1924.

On December 1, 1923, a quarterly instalment of rent, $4,000. became due and was not paid, and on December 5 the claimant paid the taxes and accrued penalties for 1923, amounting to $2609.85.

On December 19, 1923, the claimant demanded of the receiver payment of the December rent and of the taxes and also, replacement of the impaired security, but the received declined to comply with any of these demands. Thereafter, the claimant, by permission of the court duly obtained, (Ex. 3), gave the receiver and the lessee notice of termination of the lease and also notice to quit in the form and for the times specifically provided in the lease (Exs. 4 and 5). Pursuant to said notice, and according to the provisions of the lease, the lease expired on February 6, 1924. Thereafter the lessor instituted summary proceedings for the eviction of the lessee and the receiver from the demised premises. In these proceedings a final order was duly made and a dispossess warrant thereunder issued on February 19, 1924, which were duly served upon the receiver and the lessee on February 26, 1924.

On or about February 28, 1924, the claimant filed with the receiver her claim, duly verified, for $47,156.85, made up of the following items:

> "14. By reason of all the foregoing said J. M. Gidding & Co. Inc. is indebted to this claimant in the following amounts:

Rent due December 1, 1923	$ 4,000.00
Taxes and penalties paid December 5, 1923	2,609.85
Face value U. S. Goyernment bonds, which should have been replaced Sept. 11, 1923	4,050.00
Damages on termination of lease for breach of covenant as aforesaid.....	36,497.00
	$47,156.85

Together with interest on $4,000. from December 1, 1923—on $2,609.85 from December 5, 1923,—and on $4050. from September 11, 1923."

The receiver admits the items for December rent, $4,000. and taxes and penalties, $2,609.85, both of which accrued prior to the expiration of the time for filing claims. He disputes the claim for diminished security, $4,050., and the claim for damages for the loss of the unexpired term, $36,497.

This item of $36,497. represents the excess of the total rent reserved for the unexpired term over the alleged estimated value thereof, which is stated in the claim (Ex. 1, subd. 13) to be $13,000. per annum. It is expressly claimed, however, as damages substained by the lessor under the lessee's covenant to continue to be liable after the termination of the lease for a sum equivalent to the amount of all the rent reserved in the lease less the avails of reletting, *such damages to be due and payable by the lessee on the several rent days specified in the lease* (claim, ex. 1, subds. 11-13).

The receiver objected to this item on the ground that the lessee's covenant for continuing liability after reentry of the landlord provides specifically not only that the measure of damages should be the equivalent of the difference between the rent reserved and the avails of reletting, but also that such damages, so measured, "*should be due and payable by the lessee to the lessor upon the several rent*

days hereinbefore specified," that is to say, on the first days of June, September, December and March in each year; that this provision was exclusive of any other measure of damages, and that the lessor was not entitled to claim a present lump sum equal to the excess of the total rent reserved for the unexpired term over the present value of such a lease for the years it had still to run determined by expert testimony.

By agreement between the parties the receiver has consented that the claimant should offer to prove her damages for the lessee's alleged breach of the covenant to remain liable after termination of the lease, but objects to the competency of the proposed proof upon the ground above stated, and the master has been requested to determine the validity of the claim for this item of damages in order that the expense of calling expert witnesses on both sides may be avoided if the claim is not provable; and it is understood that if the claim should eventually be sustained the amount of the item demanded is not admitted but must be proved.

It seems to be ADMITTED IN the briefs filed with the master on behalf of the claimant that if her right to damages must be determined by the language of the lessee's covenant for continuing liability, the claim now made by her under that covenant will not be provable; but it is argued that the receivership and the insolvency of the lessee constitute an *anticipatory breach* of this covenant, relieving the lessor from its provisions in respect to payment of damages and entitling her to prove her whole damages as of the present time in a lump sum on the basis of a comparison between the present value of the unexpired term and the rent reserved for the seventeen years that the lease has still to run.

In her first brief filed with the master her claim is stated as follows:

> "The claim is not for rent to accrue in the future, it is not for breach of the covenant to pay rent, nor is it for damages for loss of the landlord's bargain, but it is for damages for the anticipatory breach of

the contractual obligation on the part of Gidding & Co. which came into existence only upon the termination of the lease."

And again in her reply brief the claimant argues:

> "The covenant is peculiar. It is not like any of the covenants discussed in the cases cited by counsel for the receiver. It is not in form a covenant to pay the 'difference' between the rent reserved and the proceeds of reletting, but it is in the following form:
>
> > 'The lessee hereby agrees to pay to the lessor the equivalent of the amount of all the rent reserved herein, less the avails of reletting, if any, and the same shall be due and payable by the lessee to the lessor on the several rent days above specified.'
>
> This is not a covenant to pay such damages as may be suffered from time to time as and when they shall be ascertained, but it is a positive promise to pay the amount of the rent reserved in the lease, subject, however, to a deduction. The result may, as a practical matter, be the same as would flow from the other sort of covenant, but it may be said that here is a recognition of the fact that the rental value of the premises was and would be less than the rent reserved, and that, therefore, the avails of reletting would be less.
>
> Under these circumstances, it cannot be said that the claim was contingent but only that its amount was uncertain."

The effect of this alleged anticipatory breach is the only point to be decided.

The decision of the point submitted is necessarily determined by—

(1) the cancellation of the lease on February 19, 1924, by the issuance of the warrant in summary proceedings, and,

(2) the language of the special covenant or agreement contained in the lease continuing the personal liability of the tenant.

In respect to the provability of claims in equity receiverships, the rule stated by Judge Noyes, writing the opinion of the Circuit Court of Appeals for the Second Circuit in *Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 735, has been generally approved:

> "All claims ought to be in before the accounts are made up for distribution, and there should be no opportunity for uncertainty, delay or expense in reopening or recasting them. A narrower rule can be adopted which would obviate any difficulty in this regard and which would be simple, equitable and workable. It is this: Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period."

This rule is cited with approval in *Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 601 and with more precise statement in *Samuels* v. *Drew*, 292 Fed. 734, 736 (C. C. A. 2d Circ.)

The lessee's alleged "anticipatory breach" of the covenants of the lease to pay rent and taxes and perform other obligations as tenant, was a consequence of its insolvency and the receivership. The lessee thereby became unable, and the receiver refused, to perform any longer the covenants of the lease imposing obligations upon the lessee as tenant. This breach led to the termination of the lease and the annulment of the relation of landlord and tenant. The termination of the lease and the reentry by the landlord through summary proceedings brought into active operation the agreement continuing the personal liability of the lessee, which, though contained in the lease, was wholly unconnected with the use of the land. This special agreement provides with completeness and precision just what the continuing liability of the former tenant for damages

should be, how the damages should be ascertained and even when they should become due and payable. Without this special agreement, the tenant, after the reentry of the landlord by summary proceedings would have been under no further liability at all arising out of the lease proper. (C. P. A. 1434; *Hall* v. *Gould*, 13 N. Y. 127; *Michaels* v. *Fishel*, 169 N. Y. 381, 387; *Gardiner* v. *Butler*, 245 U. S. 603.)

To say that the anticipatory breach arising from the receivership, as a consequence of which the landlord reentered and annulled the lease, was also a breach of the special agreement of the parties providing what their respective rights and liabilities should be upon such a reentry for such a breach, is an untenable argument. The anticipatory breach in this case affected the special agreement for continuing liability only by giving it vitality and operative effect. In the claimant's brief it is stated that the special agreement for continuing liability of the tenant in this lease is peculiar and unusual, and stress is placed upon the use of the word "equivalent" in the tenant's agreement to pay to the lessor after termination of the lease, "the equivalent of the amount of all the rent reserved herein less the avails of reletting" etc. The form of the covenant in this lease does not appear to be unusual. The covenant quoted in *Seidlitz* v. *Auerbach* (186 App. Div. 7, pp. 8-9; rev. 230 N. Y. 167) is almost literally the same except that it omits the provision for periodic payments. In such covenants the word "equivalent" is used to indicate that the tenant's continuing liability after the termination of the lease is not technically for "*rent*" but for "*damages*", though measured in terms of rent by the excess of the rent reserved over rent received on reletting during the unexpired term. In an early case in New York the continuing liability was stated in the complaint to be for rent, and though the Court of Appeals held that this was immaterial and the word "rent" would be construed to mean "damages", there was a strong dissent (*Hall* v. *Gould*, 13 N. Y. 127). The word "equivalent" is used to avoid this objection.

The construction of the provision of the special agreement—

> "And the same shall be due and payable by the lessee to the lessor on the several rent days above specified"—

is well settled by authority (*McCready* v. *Lindenborn*, 172 N. Y. 400). In that case the covenant for the continuing liability of the tenant provided that the tenant should pay as damages (p. 402)—

> "The difference between the amount of rent hereby reserved and the amount of rents which shall be collected and received * * *. from the demised premises during the residue of the said term * * * *in equal monthly payments as the amount of such difference shall from time to time be ascertained.*"

The court said, construing this covenant (p. 407)—

> "By the express contract of the parties a separate and independent cause of action arose under this covenant every month when there was a deficiency ascertained in the manner provided. The plaintiff was at liberty to allow the causes of action for monthly deficiency to accumulate and to recover upon several at the same time, but she could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant."

The court placed this decision on the ground that, after the termination of the lease by the landlord's reentry, the tenant was under no further liability upon the lease, as such for payment of rent or performance of any other obligation as tenant, and that his continuing liability for damages must be determined entirely by the terms of the special agreement for such liability.

The court emphasized also the rule that—

> "When the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed (p. 409)."

The authority of *McCready* v. *Lindenborn* is unimpaired and the agreement in the lease from Mrs. Morse to Gidding & Co. in the present claim that the damages shall be "*due and payable by the lessee to the lessor on the several rent days above specified*"; that is to say the first days of June, September, December and March of each year—is just as precise and specific as the covenant in *McCready* v. *Lindenborn*.

It is argued, on behalf of the claimant, that *McCready* v. *Lindenborn* does not apply and that even if it did its authority has been weakened by the decision of the Appellate Division in *Darmstadt* v. *Knickerbocker Chandelier Co.*, 188 App. Div. 129.

It does not apply, the claimant argues, because in *McCready* v. *Lindenborn* there was no anticipatory breach; but the lease in that case provided that if the premises became vacant the landlord might reenter and relet them as agent of the tenant, and that on default in the performance of any of the covenants of the lease the relation of landlord and tenant, at the option of the landlord, should cease and determine. The exercise of this option was, of course, proved by the landlord's reentry. As already shown, the alleged anticipatory breach resulting from the insolvency of Gidding & Co. and the appointment of a receiver, was not a breach of the covenant for continuing liability but operated, through the consequent annulment of the lease, to make that covenant effective.

There is nothing in the decision of the Appellate Division in *Darmstadt* v. *Knickerbocker Chandelier Co.*, 188 App. Div. 129 that in any way weakens the authority of *McCready* v. *Lindenborn* which the court expressly distinguished on the obvious ground that it contained an express provision for monthly payments of the damages. The covenant in the lease in the *Darmstadt* case contained no provision at all for periodic payment of damages by the former tenant after the termination of the lease by summary proceedings, but provided that in the event of reentry by the landlord by such proceedings, the landlord might

relet as agent of the tenant, applying rents received on the reletting to the payment of expenses and the rent due under the lease, and that the tenant "*should nevertheless remain liable for any deficiency.*" Covenants in this form have been generally held to give no right of action until the expiration of the term on the ground that until then the liability of the tenant cannot be determined. The Appellate Term so decided and dismissed the complaint, but the Appellate Division while approving the decision of the Appellate Term, held that it must reverse because the Court of Appeals in its then recent decision in *Mann* v. *Munch Brewery*, 225 N. Y. 189, had decided, contrary to its former rulings, that on a covenant of continuing liability similar to the one before the court in the *Darmstadt* case, an action could be brought before the expiration of the demised term. This conclusion seems to have been due to a complete misapprehension by the Appellate Division of the provisions of the lease before the Court of Appeals in *Mann* v. *Munch Brewery*, in which the question before that court was whether the defendant, who was in possession as assignee of the original tenant and had been evicted in summary proceedings, had assumed the covenants of the lease. The lease provided (225 N. Y., p. 194) that the tenant should not be relieved from payment of rent by eviction in summary proceedings or by assignment of the lease and that every assignee should continue to remain liable for the payment of the rent and performance of all the covenants and conditions of the lease. It appears clearly enough, by implication, from the portion of the lease quoted in the opinion of the Court of Appeals that the lease provided for monthly payments of rent by the tenant, and it is stated in the opinion (p. 195) that the defendant assignee had itself, after entering into possession, promised to pay the rent monthly. An inspection of the record shows that the tenant covenanted to pay the rent—

> "In equal monthly payments * * * in advance on the first day of each and every month during the term aforesaid."

The action was brought to recover only for the months that had expired at the time of the commencement of the action. The Court of Appeals, having decided that the assignee had assumed the covenant to pay rent monthly after eviction, simply enforced the covenant according to its terms. The case was in this respect, therefore, on all fours with *McCready* v. *Lindenborn* which, indeed, is cited as authority by the Court of Appeals on the validity of the covenant for continuing liability (225 N. Y. 194). When the misapprehension under which the Appellate Division labored in the *Darmstadt* case in respect to the form of the covenant for continuing liability in *Mann* v. *Munch Brewery* has been judicially corrected, not improbably the decision of the Appellate Term (104 Misc. 547) will be held to have been correct. However this may be, the case is not in point in the present controversy. The covenant in this case provides for a periodic ascertainment of the damages and is directly within *McCready* v. *Lindenborn*, the authority of which is not questioned in the *Darmstadt* case.

Other authorities cited in the briefs, while deciding questions analogous to that presented by this claim, are clearly distinguishable. Those that involve the construction of a lessee's covenants for continuing liability after reentry of the landlord and termination of the lease necessarily turn upon the form of the covenant, and it will be found that apparent differences in the decisions are satisfactorily explained and reconciled by comparison of the covenants involved. In *Filene's Sons Co.* v. *Weed*, 245 U. S. 598 and in the first claim allowed in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the lessee agreed, in the event of reentry and the termination of the lease, to pay the difference between the rental value and the rent and other payments named in the lease for the residue of the term. These covenants were, as the court held, agreements between the parties that the evicted lessee should be liable for a *present* payment computed according to the familiar rule of damages accruing to a lessor for loss of the profits of the unexpired term. In such cases, the contract provides for *a*

present claim determined precisely in accordance with an agreed rule. On the other hand, where the case presents a covenant which provides that the tenant shall remain liable during the unexpired term for the amount, or the "equivalent" of the amount, of all the rent reserved less the avails of reletting, without any provision for periodic settlements, the decisions hold with substantial uniformity, that the lessor has no right of action until the completion of the unexpired term, because until that time comes it is impossible to determine what the damages will be, or whether there will be any damages at all. (*Seidlitz* v. *Auerbach*, 186 App. Div. 7, 13, rev. 230 N. Y. 467; *Matter of Hevenor*, 144 N. Y. 271; *Harding* v. *Austin*, 93 App. Div. 564). Substantially similar are the bankruptcy decisions upon covenants which take the form of an agreement by the tenant to indemnify the lessor during the residue of the term for loss of rent and other payments incurred by the termination of the lease. (*In Re Ells*, 98 Fed. 967; *In re Shaffer*, 124 Fed. 111). The only conflicting decision on this form of covenant to which my attention has been called, or which I have been able to find, is the decision of the Appellate Division in *Darmstadt* v. *Knickerbocker Chandelier Co.*, 188 App. Div. 129, hereinbefore explained.

In the third form of covenant, like that in this case, where the tenant's agreement is to continue liable, after eviction, for damages to be determined and paid from time to time at the end of specific periods during the residue of the term, the necessary construction, both upon principle and authority, is that the lessor is restricted to a recovery in any action he may bring to the damages that have already become due according to the terms of the contract.

The receiver argues that there can not be an "anticipatory breach" of a unilateral agreement to pay money, like the covenant of the lessee to pay damages after the termination of the lease by reentry of the landlord for breach of condition. It is not necessary to decide this point because the determination of the controversy turns entirely upon the construction to be placed upon the agreement actually

expressed in the lease in which the parties have stated what their respective rights and liabilities shall be upon any breach of the lease by the lessee leading to its termination and the reentry of the landlord. In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, the court held that an adjudication of bankruptcy against one of the parties to an executory contract to render services to the other, either before or during performance, which disables the bankrupt from further performance, constitutes an anticipatory breach and gives the injured party an immediate right of action within the doctrine of *Roehm* v. *Horst,* 178 U. S. 1. Landlord and tenant cases cited in opposition to the claim, including *In Re Roth and Appel,* 181 Fed. 667, were distinguished by the court (p. 590) because of the "diversity between duties which touch the realty, and the mere personalty," citing Co. Litt., 292, b. sec. 513. In *In re Mullings,* 238 Fed. 58, the doctrine of anticipatory breach was applied to a lease made by a corporate tenant which had instituted a voluntary proceeding for dissolution before the commencement of the term, and afterwards was adjudicated a bankrupt on its voluntary petition. In that case there had been no termination of the lease by reentry annulling the relation of landlord and tenant, nor did the case involve any covenant or special agreement for continuing liability of the tenant after such termination.

This item of damages, therefore, in the claim presented to the receiver should be disallowed, not because it is contingent and uncertain, but because it is contrary to the contract between the parties, which expressly provides for damages measured by the difference between the rent reserved and the rent *actually* received from time to time on reletting, to be ascertained and paid quarterly. Obviously, before it can be paid, it must be ascertained. Undoubtedly, any claim in conformity with the contract covering any period except the quarter falling due on March 1, 1924, would have been uncertain and, indeed, impossible of estimation, and, therefore, wholly contingent, because the rents that would be received in future period could not be known

and the avails of reletting might in many quarters exceed the rent reserved.

I return herewith:

(1) Stenographer's minutes of proceedings before the special master.

(2) Exhibits:—

(1) Original claim.
(2) Copy of lease from Morse to Gidding & Co.
(3) Copy of petition and order of January 14, 1924.
(4) Twenty days notice to lessee of lessor's intention to end the term, etc.
(5) Lessor's demand upon receiver for payment of rent, taxes, etc.

All of which is respectfully submitted.

Dated June 27, 1924.

(Signed) WALLACE MACFARLANE,
Special Master.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 505.

MANHATTAN PROPERTIES, INC.,

Petitioner,

v.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

No. 506.

SAMUEL R. BROWN *et al.*,

Petitioners,

v.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF ARTHUR A. BALLANTINE, AS AMICUS CURIAE.

ARTHUR A. BALLANTINE,
Attorney for Charles D. Hilles, Eugene W. Leake and Charles E. Richardson, Trustees in Bankruptcy of Paramount Publix Corporation, as amicus curiae.

ARTHUR A. BALLANTINE,
HENRY J. FRIENDLY,
Of Counsel.

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Bankruptcy Act of 1867, c. 176, 14 Stat. 517, sec. 19 12, 18, 26

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended:

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 505.

MANHATTAN PROPERTIES, INC.,

Petitioner,

v.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

No. 506.

SAMUEL R. BROWN *et al.*,

Petitioners,

v.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF ARTHUR A. BALLANTINE, ATTORNEY FOR CHARLES D. HILLES, EUGENE W. LEAKE AND CHARLES E. RICHARDSON, TRUSTEES IN BANKRUPTCY OF PARAMOUNT PUBLIX CORPORATION, AS AMICUS CURIAE.

Introductory Statement.

These cases present the question whether the claim of a landlord, whose lease has been rejected by a trustee of the bankrupt estate of the tenant, may be proved against

such estate, where the only obligation of the tenant surviving the landlord's reentry is a covenant to indemnify the landlord against actual loss of rent during the residue of the term.

In the decisions under review the Court of Appeals for the Second Circuit affirmed rulings of the District Court for the Southern District of New York that such a claim was not provable. 66 F. (2d) 470, 473. The applicable provisions of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. C. Title 11), are quoted in the margin.*

The decisions in these cases will control the disposition of a large number of claims which have been filed against the bankrupt estate of Paramount Publix Corporation. If, contrary to what has been the general understanding, claims for future rent should now be held provable in bankruptcy, and should be liquidated on the basis of the depressed level of rentals now existing, persons who loaned money, sold merchandise or furnished services to this bankrupt, might be forced to concede a large share of the assets of their debtor to persons whose claims did not appear in the balance sheet of the debtor and *who may never suffer any actual loss.*

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* Section 63 provides, so far as here material:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied."
>
> "b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Subdivision 11 of Section 1 provides:

> "'Debt' shall include any debt, demand or claim provable in bankruptcy."

It was held in *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903), that paragraph b of Section 63

> "adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct."

Statement of the Facts.

We shall summarize at this point the few controlling facts in the cases under review.

No. 505, *Manhattan Properties, Inc., Petitioner,* v. *Irving Trust Company,* involves a lease for a term commencing February 1, 1928 and terminating October 1, 1937 (R. 3). The lease was made in New York and the premises were located in New York. The lease provided that if the tenant should default in the payment of rent or if bankruptcy proceedings should be instituted by or against the tenant, the landlord might re-enter and relet the premises as the tenant's agent (R. 13). The lease further provided that in the event of such re-entry (R. 13-14):

> "The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The tenant thereafter filed a voluntary petition in bankruptcy. The claim which was disallowed was for $25,000,—the difference between the rent and the estimated rental value from April 1, 1932 to October 1, 1937 (R. 2).

No. 506, *Samuel R. Brown, et al., Petitioners* v. *Irving Trust Company*, involves a lease for a term commencing July 1, 1920 and expiring June 30, 1945 (R. 5). The premises were located in Nebraska. The place of the making of the lease does not appear. The lease provided that on default by the lessee or its adjudication in bankruptcy, the lessor might enter upon the premises and that upon such entry, the lease should terminate (R. 7). The lease continued as follows:

> "* * * the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

On August 29, 1932, the tenant filed a voluntary petition in bankruptcy (R. 1). On November 26, 1932, the lessor entered upon the demised premises (R. 4). The claim which was disallowed was for $143,615.80,—the difference between the stipulated rent of $20,000 per annum and the rental value of the premises which was estimated as $5,000 annually, for the period from November 26, 1932 until June 30, 1945.

Summary of the Argument.

It is the contention of the petitioners that a landlord's claim for loss of future rents is provable in bankruptcy like claims under other executory contracts, and that a contrary holding must rest upon antiquated learning as to the nature of leases and not upon any logic now applicable.

We contend, on the contrary, that the position that claims for loss of future rent are not provable in bankruptcy, as the Bankruptcy Act has been understood up to date, follows directly from the nature of a lease as contrasted with that of other executory contracts.

As we shall show in Point I of this brief, it is the long established doctrine of the common law that when a landlord resumes possession of leased premises he has no right to damages for loss of rent accruing after that date, unless the lease by express terms provides such a right. Because of this well understood rule as to lease claims, it has become common practice to insert in leases covenants on the part of the tenant which give the landlord certain rights that survive his reentry. This was done in the leases involved in the two cases under review. But in these covenants the tenants agreed only to indemnify their landlords against actual loss of rent accruing during the balance of the term. They did not agree to pay to their landlords the amount of an estimated loss which may never occur,—what is claimed here.

The petitioners are, in effect, asking the bankruptcy court to supply a new covenant in these leases. They are forced to contend that *Section 63a of the Bankruptcy Act has the effect of altering the common law of landlord and tenant, or of transmuting an obligation to indemnify against actual loss, when, as and if suffered, into an obligation to pay immediately the estimated amount of such loss.* In Point II of this brief we shall show that there is nothing in the language of the Bankruptcy Act, in its history, or in the decisions of this Court construing it, which gives any support to such a contention. We contend that, to the contrary, it appears in every relevant decision of this Court, either expressly or implicitly, that claims such as those here involved may not be proved against the estate of a bankrupt.

It was argued below that the action of Congress in specifically providing that claims for future rent should be provable debts in proceedings under Section 74 and 77, which were added to the Bankruptcy Act by the Act of March 3, 1933, c. 204, 47 Stat. 1467, changed the existing rule as to the provability of such claims in other proceedings under the Act. That argument was completely an-

swered in the opinion of Judge Learned Hand in No. 505 below (R. 29-30), and was abandoned in the petitions for certiorari. However, in their brief in this Court, the petitioners revive the contention in a slightly altered form. They now argue that the amendment was a declaration by Congress of what had always been its intention with regard to future rent claims. We submit that this construction is plainly untenable and, as we shall contend in Point III of this brief, that the action of Congress has a significance quite different from that attributed to it by the petitioners. Although the attention of Congress was called to this very question of the provability of landlords' claims, Congress deliberately confined the scope of its enactment to proceedings brought under the new sections added to the Act and declined to make any alteration in the doctrine applicable in ordinary bankruptcy proceedings. Certainly, in the light of this recent refusal on the part of Congress to upset the rule which has been generally understood and accepted by lawyers and business men for the past thirty-five years, no such drastic change should now be made by this Court.

POINT I.

THE PETITIONERS' CLAIMS CANNOT BE SUSTAINED EITHER ON A THEORY OF BREACH OF THE TENANTS' COVENANTS FOR RENT OR ON A THEORY OF BREACH OF THE TENANTS' COVENANTS TO INDEMNIFY THEIR LANDLORDS AGAINST LOSS OF RENT. TO GIVE THE LATTER COVENANTS THE EFFECT OF COVENANTS TO LIQUIDATE DAMAGES WOULD VARY THE AGREEMENTS OF THE PARTIES IN AN ESSENTIAL RESPECT.

The entire argument of the petitioners is based upon an asserted analogy between leases and other executory contracts. The difficulty is that while the law *might* have recognized such an analogy, it has not done so. As said by this Court in rejecting a similar argument in *Gardiner* v. *Butler & Co.*, 245 U. S. 603 (1918):

> "Of course, there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke."

The doctrines of the law of landlord and tenant, upon which commercial transactions have been conducted up to this time, cannot now be dismissed as of mere antiquarian interest.

It has long been the rule of the common law that a landlord who has reentered and terminated a lease* has no further claim against the tenant on his covenant for rent.

> *Bird* v. *Defonvielle*, 2 C. & K. 415 (1816);
> *Hall* v. *Burgess*, 5 B. & C. 332 (1826).

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* This is clearly the situation in No. 506 (R. 4). It does not appear from the record in No. 505 whether or not the landlord had reentered at the time of the hearing on the claim. But since the claim is for the difference between the stipulated rent and the estimated rental value of the premises, the claim necessarily assumes that such reentry will occur.

This rule is law in New York. *McCready* v. *Lindenborn*, 172 N. Y. 400 (1902). The rule applies even where the lease provides, as in No. 505, that the landlord may relet as the tenant's agent. *Hermitage Co.* v. *Levine*, 248 N. Y. 333, 337 (1928). We have found no authority indicating the existence of a different rule in Nebraska.

This rule does not deprive the landlord who has re-entered, merely of the right to maintain actions for the instalments of rent as they become due; it deprives him of *all* claims based on the tenant's covenant to pay rent. Accordingly, he cannot recover damages for the loss of his bargain, whether such damages are estimated or actual. This principle applies equally whether the attempt is made in an action at law or by a proof of claim in receivership or bankruptcy. The rule was stated by this Court in *Gardiner* v. *Butler & Co.*, *supra*:

> "The second claim * * * is for damages similar to those held allowable under the former lease, *but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his re-entry, the lease not containing any clause stipulating for such an allowance.* Of course there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition and we believe that it is the general understanding in that State that *in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee.* *Sutton* v. *Goodman*, 194 Massachusetts 389, 395. *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, 590. Upon this claim the decree below is affirmed." (Italics ours.)

Even where there is no termination of the lease, the landlord cannot, in the absence of special covenant, immediately recover the difference between the stipulated rent and the estimated avails of reletting. In such a case the term continues in the tenant, and the landlord's remedy is to sue for the monthly instalments of rent as they become due. In *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, 589-590 (1916), this Court recognized that the doctrine of anticipatory breach of contract has no application in the case of leases of real property. See also

Miller v. *Benton*, 55 Conn. 529 (1887);
Connolly v. *Coon*, 23 Ont. App. 37 (1896);
McCready v. *Lindenborn*, 172 N. Y. 400 (1902);
Wells v. *Twenty-First Street Realty Co.*, 12 F. (2d) 237 (C. C. A. 6th, 1926);
Phillips-Hollman v. *Peerless Stages, Inc.*, 210 Cal. 253 (1930).

The case falls within the general exception to the rule of anticipatory breach stated by this Court in *Rochm* v. *Horst*, 178 U. S. 1, 17 (1900):

> "* * * the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

It is clear that under the law of New York, no action lies for anticipatory breach of a lease. *McCready* v. *Lindenborn*, *supra*. See *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 35 (1926). We have found no basis for belief that a different rule is in force in Nebraska.

The law as to this matter is well summed up on page 38 of the petitioners' brief in this Court:

> "This point is that rent is the consideration for possession, and when possession is resumed by the landlord, the covenant to pay rent is terminated.

> and as the allowance of a claim for damages for loss of future rents necessarily involves resumption of possession by the landlord, the only covenant on which a claim could be based is cancelled, unless there is an indemnity covenant substituted for the covenant to pay rent."

It follows from this doctrine that breach or repudiation of a lease does not give rise to a claim against a solvent lessee for damages for breach of his promise to pay rent. The petitioners have not been able to point to anything in the Bankruptcy Act which justifies a bankruptcy court in disregarding this established doctrine as to leases.

It was precisely because of these rules of the common law that the practice developed of including in leases, in addition to the covenant for rent, other covenants on the part of the tenant which expressly survive reentry by the landlord because of the tenant's default. Such clauses, unless penal in character, are given effect. But the rights and obligations enforced are rights and obligations growing out of express contracts. The petitioners are arguing that no such contracts are necessary since the common law doctrine of landlord and tenant may be disregarded in bankruptcy, or in the alternative, that if some special covenant is necessary, its language may be disregarded if it does not suit the purpose.

The covenants as to surviving liability commonly used in leases may be broadly divided into two types. One such type is a covenant for liquidated damages. In a covenant of this type, the tenant agrees to pay the difference between the stipulated rent and the rental value *at the date of the tenant's default.* Such, for example, was the covenant in the lease involved in *William Filene's Sons Company* v. *Weed,* 245 U. S. 597 (1918), where the lessee agreed to

> "* * * pay to the lessor as damages a sum which at the time of such termination or at the time to

> which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term."*

Under such a covenant, the tenant takes the risk that he may default under conditions of depressed rents and that he may have to pay in damages sums far in excess of the loss that the landlord will actually suffer. The landlord takes the risk that the tenant's default may occur at a date when rental values have not varied perceptibly from those prevailing at the date of the lease (or may have increased), and that he may be left uncompensated for loss through a fall in rentals thereafter. Still, the courts enforce the agreement of the parties as a liquidation of damages "upon a footing that was familiar and fair". *William Filene's Sons Company* v. *Weed, supra,* at 602.

Quite different in nature are covenants to indemnify against loss. In some cases, as in the lease involved in No. 505, the tenant agrees to pay the landlord monthly any loss which the landlord may have suffered during the preceding month. In other cases, as in the lease involved in No. 506, the tenant's covenant is only to indemnify the landlord against loss of rent during the entire residue of the term. In neither case is the landlord entitled, immediately upon reentry, to recover his estimated damages for the residue of the term.

Woodbury v. *Sparrell Print,* 187 Mass. 426 (1905);

Providence Building Co. v. *Atlantic National Bank,* 228 Fed. 814 (D. R. I., 1916);

Merchants' National Bank v. *Ryerson,* 251 Mass. 314 (1925);

Hermitage Co. v. *Levine,* 248 N. Y. 333 (1928).

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* See page 37 of the Record in the *Filene* case in this Court.

The reason was succinctly stated by Mr. Justice (then Chief Judge) Cardozo in *Hermitage Co.* v. *Levine, supra*, at 338:

> "• • • it may turn out in the end that there has been a gain and not a loss."

It is obvious, therefore, that the differences between the rights and obligations created by covenants for *liquidated damages* on the one hand, and the various types of *indemnity* covenants on the other, are of large consequence. The choice between the two types of covenant is likely to involve differences of many thousands of dollars if default occurs. In particular, it has long been recognized that the provability of a claim arising out of a covenant surviving reentry, against the insolvent estate of a tenant, depends in large measure on whether the tenant's covenant is or is not to pay a sum ascertainable as of the date of default.

The presence in the lease involved in the *Filene* case of a covenant under which the tenant's entire liability was determinable immediately upon default, was not accidental. It was an instance of a practice in Massachusetts, which had been suggested by Judge Lowell over forty years before in his opinion in *Ex parte Lake*, Fed. Case No. 7991 (D. Mass., 1877). In that case, which arose under the Bankruptcy Act of 1867, the lease provided that upon default and reentry by the lessor, the lessees:

> "• • • shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited for such amounts only as shall be by the lessors actually realized."

Judge Lowell held that a claim for future rent was not provable against the bankrupt estate of the lessees, saying:

> *"If the contract were a little different and provided merely that the lessees should pay any loss or*

damage consequent upon the diminished value of the premises, the amount would be capable of ascertainment with sufficient certainty. * * * But I am unable to reach the conclusion that the stipulation in this case is calculated to work out the result. It seems to provide that the lessees, after a breach shall remain liable for the rent precisely as before, excepting that they are to be credited with any sums actually received for the use of the premises. *This brings the case unfortunately within the numerous decisions concerning rent, which, not accruing at once, cannot be estimated beforehand."* (Italics ours.)

The contention of the petitioners seems to be that the Court should ignore the language in which the parties embodied their agreements, and that covenants by tenants to indemnify against actual loss when, as and if suffered, should be given the effect of agreements to pay the difference between the stipulated rent and the rental value at the time of the default. The courts will not so lightly set aside the agreements of the parties. As said by Judge Mack in *Western Electric Co., Inc.* v. *Powers Accounting Machine Co.,* an unreported decision cited in the opinion of the Referee in No. 506 (R. 25-26), in denying, in an equity receivership, proof by a landlord of a claim based on a covenant by the tenant to indemnify against loss:

"Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. *The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they have provided that on such termination, when but for the provisions no*

damages could be claimed, the lessee 'shall be liable for any loss or deficiency of rent which may be suffered'." (Italics ours.)*

It is said that to adhere to the language used by the parties produces a harsh result. Such a contention was met by the New York Court of Appeals in *Hermitage Co.* v. *Levine*, *supra*, at 338-339, as follows:

"We do not overlook the hardship to the landlord in postponing the cause of action until October,

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* The analysis in Judge Mack's opinion in this equity case is so pertinent to the instant cases that we quote in this footnote the essential steps in his reasoning:

"A lease of an interest in real property is the creation or grant of a chattel real; rent reserved is compensation for the enjoyment of the interest during the period for which the rent is paid or is payable; neither insolvency nor bankruptcy of the lessee affects the term created except as the title thereto, unless rejected, becomes the property of the Receiver or Trustee and the latter thereby is subjected to payment of the reserved rent. If the interest be not accepted by Receiver or Trustee either at once or retroactively after a period during which the advisability thereof is under consideration, the interest with the rental obligation remains in and on the insolvent or bankrupt. Insolvency or bankruptcy of itself creates no breach anticipatory or otherwise of the rent obligation because it does not terminate the leasehold estate.

* * * * * * * * * * * *

"The parties may, however, incorporate an executory contract in the lease; that contract may, like other executory contracts, be broken by anticipation; such a breach may, under circumstances, give rise to a claim provable either in bankruptcy or in equity proceedings; it may indeed be deemed retroactive as of the date of the proceedings even if actually created by the subsequent exercise of an option exercisable because of or on the bankruptcy or appointment of a Receiver.

* * * * * * * * * * * *

"If * * * there be a contractual provision for damages on such a termination and the measure of those damages fixed by the agreement be the difference at the time of a termination between the market value of the lease and the discounted value of the rents reserved, and if the termination be reasonably prompt so as to enable a liquidation of the amount before the time for filing proofs shall have expired, then at least in equity proceedings such a claim is provable. *Filene* v. *Weed*, *supra*.

"But, if as in the present case, on such a termination a lessee becomes liable not for an amount then ascertainable but for the entire loss that the lessor may actually suffer during the remainder of the original term, inasmuch as it is clearly impossible to ascertain that loss until the original term shall have expired,—in this case about nine years,—the claim must be rejected as uncertain. *In re Roth & Appel*, *supra*; *Penn. Steel Co.* v. *N. Y. City Ry. Co.*, 198 Fed. 721, 759."

Then follows the paragraph quoted above in the text.

> 1945. * * * If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of a tenant whose liability for the future ended with the cancellation of the lease except in so far as he bound himself by covenant to liability thereafter."

In these cases also the leases were obviously drawn by lawyers. The language for the tenants' covenants was deliberately and carefully chosen. It can neither be disregarded nor can deficiencies be supplied. To disregard carefully drawn contracts or treat them as something different from that which they purport to be, would itself introduce harshness and uncertainty into commercial transactions. We shall now show that there is nothing in the Bankruptcy Act which justifies such a course.

POINT II.

THERE IS NOTHING IN THE LANGUAGE OR HISTORY OF THE BANKRUPTCY ACT OR IN THE DECISIONS OF THIS COURT CONSTRUING IT, WHICH LENDS SUPPORT TO THE CONTENTION THAT THE PETITIONERS' CLAIMS ARE PROVABLE IN BANKRUPTCY. IN EVERY RELEVANT DECISION OF THIS COURT IT APPEARS EITHER EXPRESSLY OR IMPLICITLY THAT SUCH CLAIMS ARE NOT PROVABLE AGAINST THE ESTATE OF A BANKRUPT.

A. Claims like those of the petitioners were not provable under earlier Bankruptcy Acts. There is no indication that the Act of 1898 was designed to change the existing rule.

In determining the provability of claims under the Bankruptcy Act of 1898, this Court has repeatedly given weight to the provisions of earlier acts and to decisions under them.

> *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903);
> *Crawford* v. *Burke*, 195 U. S. 176 (1904);
> *Schall* v. *Camors*, 251 U. S. 239 (1920);
> *Maynard* v. *Elliott*, 283 U. S. 273 (1931).

The Bankruptcy Act of 1841, c. 9, 5 Stat. 440, contained specific provision for the proof of contingent claims.* Nevertheless, claims for future rent as such were held to be non-provable under this statute. *Bosler* v. *Kuhn*, 8 Watts & S. 183 (1844); *Savory* v. *Stocking*, 4 Cush. 607 (1849).

The decision of this Court in *Riggin* v. *Magwire*, 15 Wall. 549 (1872), shows that claims based on indemnity clauses

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* Section 5 of the Act of 1841 provided:

"* * * all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti; * * *"

such as those in the leases here involved, would likewise have been held to be non-provable under the Act of 1841. The facts in that case were as follows: Riggin, in 1839, had conveyed land to one Ellis and had warranted title. Prior to the conveyance from Riggin to Ellis, the land had belonged to Thomas, a married man, and Mrs. Thomas had never released dower. In 1843 Riggin became bankrupt and received his discharge. Five years later Thomas died. His widow sued the persons then in possession, who had acquired their title from Magwire (to whom Ellis' rights had devolved). Magwire then brought an action against Riggin for the amounts which he had been obliged to expend in purchasing Mrs. Thomas' dower rights. Riggin pleaded his discharge. He urged that the claim for breach of the warranty could have been proved against his bankrupt estate since "the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities". This Court overruled the defense, saying, by Mr. Justice Bradley:

> "In 1843 Martin Thomas was still living and there was no certainty that his wife would ever survive him. *It was uncertain whether there would ever be any claim or demand.* * * * *If an action at law had been brought on the covenant at that time nominal damages at most, if any damages at all, could have been recovered.* It did not come within the category of annuities and debts payable in future, which are absolute existing claims." (Italics ours.)

This decision has a direct bearing upon the instant cases. Riggin's covenant, like those of the tenants here, was to indemnify against actual loss. Whether there would be such a loss could not be determined in the *Riggin* case until Thomas' death, nor here until the expiration of the respective terms. In the *Riggin* case, this Court held that there was nothing in the Bankruptcy Act of 1841 which transmuted Riggin's liability to indemnify against actual

loss into one to pay the estimated amount of a loss which might never occur. There is no reason to give any greater effect to the Bankruptcy Act of 1898.

The Bankruptcy Act of 1867, c. 176, 14 Stat. 517, like the Act of 1841, made provision for the proof of contingent debts and, in addition, contained certain specific provisions as to rent.* The decisions appear to have been unanimous that neither future rent claims as such nor claims arising under indemnity clauses such as those here involved were provable under this Act. See *Ex parte Houghton*, Fed. Case No. 6725 (D. Mass., 1871); *In re May*, Fed. Case No. 9325 (S. D. N. Y., 1874); *In re Commercial Bulletin Company*, Fed. Case No. 3060 (D. La. 1876); and particularly, the well reasoned opinion of Judge Lowell in *Ex parte Lake*, Fed. Case No. 7991 (D. Mass.), referred to on pages 12 and 13, *supra*.

It appears, therefore, that when Congress enacted the Bankruptcy Act of 1898, the rule that landlords were not entitled to prove either future rent claims as such or claims under covenants to indemnify against loss, was already well established. If it was desired to change this rule, and thus to enable landlords to prove in bankruptcy claims on which they could not have sustained actions at law, specific language to that effect should have been used. *Schall* v. *Camors*, 251 U. S. 239 (1920); *Jewell-La Salle Realty Co.* v. *Buck*, 283 U. S. 202 (1931).

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* Section 19 of the Act provided:

"In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

* * * * * * * * * * *

"Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditors may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

The petitioners make considerable point of the fact that in England the claims of landlords may be proved in bankruptcy. It is difficult to see what comfort the petitioners can find in the English law. No one denies that it is *possible* for the legislature to make landlords' claims provable. The question, as recognized by the petitioners (p. 21 of their brief), is whether or not it has done so. When Parliament changed the English law in this respect, it left no room for doubt as to its intentions. By specific provision of the Statute of 32 & 33 Vict., c. 71, Sec. 23 (1869), the landlord was given a provable claim for loss resulting from the disclaimer of a lease by a trustee in bankruptcy. The Statute of 1883 (46 & 47 Vict., c. 52) provided broadly in Section 37 (3) for the proof of "* * * all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order," and contained, in Section 55, specific provision for the disclaimer of leases by the trustee and the proof of claims of "any person injured by the operation of a disclaimer."

These provisions of the English bankruptcy statutes and the decisions of the courts thereunder [*Ex parte Llynri Coal Co.*, L. R. 7 Ch. App. 28 (1871); *Ex parte Blake*, 11 Ch. Div. 572 (1879)], must have been known to Congress at the time of the enactment of the Bankruptcy Act of 1898. If Congress had desired to change the rule against the provability of future rent claims which had prevailed under the former bankruptcy acts, it could easily have expressed that desire by language similar to that in the English statutes. Instead, the language of the Act of 1898 was much less favorable than that in earlier bankruptcy acts to the proof of contingent claims. Not until the decision of this Court in *Maynard* v. *Elliott*, 283

U. S. 273 (1931), was it definitely established that certain contingent claims, admittedly provable under the earlier acts, continued to be provable under the Act of 1898.

The reasoning of this Court in *Schall* v. *Camors*, *supra*, is particularly pertinent. In that case the Court held that tort claims, which the lower courts had consistently regarded as non-provable under earlier bankruptcy acts, were likewise non-provable under the Act of 1898. The Court reviewed the Act and its legislative history and found no basis, either in its language or in its history, for a conclusion that Congress intended to depart from the rule theretofore existing.* The same analysis leads inevitably to the conclusion that no change was intended in regard to claims for future rent.

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*The Court said, per Mr. Justice Pitney:

"Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely *ex delicto*. (Citing authorities.)

"Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63d section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the First Session of the 54th Congress. Having then failed of passage, it was submitted again in the Second Session of the 55th Congress as a substitute for a Senate bill; after disagreeing votes of the two Houses, it went to conference, and as the result of a Conference Report became law. *It is significant that Sec. 63 defining 'Debts which may be Proved' remained unchanged from first to last, except for a slight and insignificant variance* in clause (5) in the final print, the word 'interests' having been substituted for 'interest'. House Rep. No. 1228, 54th Cong., 1st sess., p. 39; House Rep. No. 65, 55th Cong., 2nd sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. *Such claims might easily have been mentioned if intended to be included.* Upon every consideration we are clear that claims based upon a mere tort are not provable." (Italics ours.)

B. The decisions of this Court construing the Bankruptcy Act of 1898 furnish no support to the argument of the petitioners. The Act has consistently been construed by this Court as rendering claims such as those of the petitioners non-provable.

(1) *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903).

The first case in which this Court construed Section 63 of the Bankruptcy Act of 1898 was *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903). In that case, this Court held that the claim of a wife under a contract requiring the husband to make monthly payments so long as she remained unmarried was not provable under the Bankruptcy Act of 1898. While the Court recognized that a similar claim had been held provable under the English bankruptcy statute, it decided that the much more limited language of the Act of 1898 did not permit such proof. The Court quoted with approval the statement by Mr. Justice Bradley in *Riggin* v. *Maguire*, *supra*, "that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable".

(2) *Williams* v. *United States Fidelity & Guaranty Company*, 236 U. S. 549 (1915).

The petitioners make frequent reference to the decision of this Court in *Williams* v. *United States Fidelity & Guaranty Company*, 236 U. S. 549 (1915). They assert (p. 22) that the decision in the *Williams* case "furnishes a chart and compass for the solution of the question". We submit that, so far as the decision in the *Williams* case has any bearing at all upon the present cases, it points to a rejection of the petitioners' claims.

The facts in the *Williams* case were as follows: The United States Fidelity & Guaranty Company had executed

a surety bond guaranteeing the performance by the bankrupts of a construction contract with certain school trustees. The contract had been abandoned long prior to the filing of the petition, and before that date the school trustees had completed the entire construction. The surety company, subsequent to the discharge of the bankrupts, reimbursed the school trustees for the damages sustained by them. It then brought suit for indemnity against the bankrupts. This Court held that their discharge constituted a complete defense.

It was conceded that the claim of the school trustees against the contractors might have been proved in the bankruptcy of the latter. But, as stated in Mr. Justice McReynolds' opinion, counsel for the surety company contended that the claim of the company against the bankrupts on the latters' covenant of indemnity was, at the date of the filing of the petition, still contingent on payment by the company and therefore not provable and not discharged. The decision of this Court was not, as might be inferred from the petitioners' brief, that in spite of this contingency the claim for indemnity was provable. Its decision, on the contrary, was that Section 57i of the Bankruptcy Act, expressly preserving the right of subrogation, operated to deprive the surety of *any* claim to indemnity and confined him to the remedy of proving the original debt against the estate in the name of the creditor. Compare General Order XXI (4).

The decision in the *Williams* case was thus based upon the existence in the Bankruptcy Act of a specific provision construed to require departure from a common law doctrine (*viz.*, the surety's right of indemnity) that would have been applicable in the absence of bankruptcy. The Act contains no such provision requiring, or permitting, a departure from the general rules of the law of landlord and tenant.

(3) *Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916).

The next decision having a bearing upon the present problem was *Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916). Two points were there decided. The first was that in the case of an executory commercial contract, in which the promises were interdependent, the filing of a bankruptcy petition by or against one of the parties, when followed by adjudication and rejection of the contract by the trustee, would be deemed to have the same effect as a repudiation of the contract by the bankrupt. The second was that

> "it would be 'an unnecessary and false nicety' to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition."

That the doctrine of anticipatory breach was not applicable to leases, was clearly recognized by Mr. Justice Pitney when, in referring to the citation by the trustee of

> "* * * a number of cases arising out of the relation of landlord and tenant * * *"

he stated:

> "Cases of the latter class are distinguishable, because of the 'diversity between duties which touch the realty, and the mere personalty'. Co. Litt. 292, b, Section 513."

(4) *William Filene's Sons Company* v. *Weed,* 245 U. S. 597 (1918).

The next case, and one upon which the petitioners appear to place much reliance, is *William Filene's Sons Company* v. *Weed,* 245 U. S. 597 (1918), wherein it was

held that claims of a landlord arising under the liquidated damage clause quoted on pages 10 and 11, *supra*, might be proved in an equity receivership of the tenant.*

It has already been pointed out that the liquidated damage clause in the *Filene* case differed from the indemnity clauses here involved in an absolutely essential respect. The clause in the *Filene* case provided that the tenant should pay the difference between the stipulated rent and the rental value at the time of default. The amount payable by the tenant was definitely determinable once and for all at that date. In permitting the landlord to prove a claim arising out of such a covenant, the Court was simply enforcing the express contract of the parties. Nevertheless, this Court, in holding that the landlord's claim might be proved in an equity receivership, indicated that even a claim arising out of such a clause could not be proved in bankruptcy, Mr. Justice Holmes saying:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim

* A like holding was made in the companion case of *Gardiner* v. *Butler & Co.*, 245 U. S. 603 (1918), as regards a lease containing a covenant identical with that in the *Filene* case. However, in the *Gardiner* case, the Court held that a claim of Gardiner's for breach of another lease which contained only a covenant for rent could not be proved against the insolvent estate of Butler & Co. See p. 8, *supra*.

that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741."

(5) *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224 (1930).

The decision in *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224 (1930), is also relied on by the petitioners. In that case, which likewise arose in Massachusetts, the parties, as in the *Filene* case, had drawn a clause which gave the landlord a right to recover damages immediately upon default. There was no assertion by the landlord, as in the present cases, of a right to prove a claim arising from the tenant's covenant to indemnify against losses which may never occur. The claim was disallowed, as against the bankrupt estate of the tenant, because the provision, instead of being a reasonable liquidation of damages as in the *Filene* case, attempted to make the entire future rent the measure of the landlord's damage. The Court refused to enforce the clause on the ground that it was a provision "for an unenforceable penalty".

(6) *Maynard* v. *Elliott*, 283 U. S. 273 (1931).

We come finally to the decision in *Maynard* v. *Elliott*, 283 U. S. 273 (1931), in which this Court held that the holder of notes which had not yet matured at the time of the filing of the petition might prove a claim against the bankrupt estate of an indorser. It is this decision upon which the petitioners principally rely. We believe, on the contrary, that the very line of reasoning which in the *Maynard* case led to a holding of provability, leads inevitably in the instant cases to a holding of non-provability.

The argument for the trustee in the *Maynard* case was, in effect, that under the Bankruptcy Act of 1898, no contingent claims were provable. The answer made by this

Court was based primarily on considerations of history and practice. The Court pointed out that the claims involved were of a nature which by specific provision had been made provable by the Act of 1841 and the Act of 1867. Under the Act of 1898, there had been an unbroken construction that such claims were provable, commencing within three years after the enactment of the statute and not seriously challenged for a period of twenty-six years. With this background, it was held that

> "* * * Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted especially where overturning the established practice would have such far reaching consequences as in the present instance."

The history and practice, as regards the claims here involved, are equally enlightening. Future rent claims were not provable under the Act of 1841 or the Act of 1867 (see pp. 16-18, *supra*). Within two years after the enactment of the Act of 1898, Judge Lowell, one of the foremost authorities in the country on bankruptcy matters, held that the new Act had made no change in the former rule. *In re Ells*, 98 Fed. 967 (D. Mass., 1900). In the same year, future rent claims were held non-provable by the Court of Appeals for the Fifth Circuit in an opinion in which the Court stated that all of the Referees and District Judges who had passed upon the question had taken a similar view. *Atkins* v. *Wilcox*, 105 Fed. 595 (C. C. A. 5th, 1900). Five years later the Court of Appeals for the Eighth Circuit, the Court being composed of Judge Sanborn, Mr. Justice (then Judge) Van Devanter and District Judge Phillips, in *Watson* v. *Merrill*, 136 Fed. 359 (1905), announced a similar conclusion. Five years thereafter the Court of Appeals for the Second Circuit in *In re Roth & Appel*, 181 Fed. 667 (1910), and the Court of Appeals for the First Circuit in *Slocum* v. *Soliday*, 183 Fed. 410 (1910), reached the same result. The

same rule was adopted in the Ninth Circuit in *Colman Company* v. *Withoft,* 195 Fed. 250 (1912), and in the Sixth Circuit in *Wells* v. *Twenty-First St. Realty Company,* 12 F. (2d) 237 (1926).* The doctrine in these cases has been relied upon by innumerable bondholders and merchandise creditors in extending credit to lessees, both individual and corporate, and by landlords in making leases with individual lessees and in failing to file proofs of claim for future rent against the estates of bankrupt lessees. The language of the Court in the *Maynard* case is directly applicable:

> "* * * Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted especially where overturning the established practice would have such far reaching consequences."

Not only is the entire basis of the decision in *Maynard* v. *Elliott* lacking in the case of claims such as are here involved, but the operative facts are radically different. Contingent obligations on indorsements are commonly regarded as liabilities in commercial practice and are shown as such on balance sheets of the indorser. The amount of the indorser's liability is definitely fixed. In cases where

* The petitioners' brief (p. 17) refers to the statement by the Court below in its opinion in No. 505, that "the rule in the Third and Seventh Circuits is otherwise" (R. 28). It is believed that this statement goes much farther than the decisions warrant. The cases in the Third Circuit apparently permit proof of a claim, not for damages, but for rent as such, which has been accelerated in accordance with the provisions of the lease. The landlord is not permitted to resume possession of the premises, and the leasehold becomes part of the general assets of the estate. *In re Keith-Gara Company,* 203 Fed. 585 (E. D. Pa., 1913), affirmed on opinion below, 213 Fed. 450 (C. C. A. 3d, 1914); *Rosenblum* v. *Uber,* 256 Fed. 584 (C. C. A. 3d, 1919); *Electric Appliance Co.* v. *Ellis,* 4 F. (2d) 108 (C. C. A. 3d, 1925). These decisions are thoroughly consistent with the position taken in this brief. So far as the Seventh Circuit is concerned, it appears from the recent decision in *In re National Credit Clothing Co., Inc.,* 66 F. (2d) 371 (C. C. A. 7th, 1933), that the Court of Appeals for that circuit is in accord with the majority view. The Court of Appeals stated that the claim there in question could be supported only if there were facts which distinguished the case from the decisions "which hold that in states where the common law prevails a claim for damages for anticipatory breach of a lease of real estate is not provable in bankruptcy", and cited with approval the decisions in the Second, Sixth and Eighth Circuits above mentioned.

the solvency of the maker has not been determined when the claim is liquidated, the claimant will be obliged to account to the bankrupt estate of the indorser to the extent that his collections exceed the amount of the note, and this right of the bankrupt estate can be realized on at a judicial sale. See *In re Manhattan Brush Manufacturing Company*, 209 Fed. 997 (S. D. N. Y., 1913). The case bears no analogy to that of a claim arising out of a covenant to indemnify against loss over a period of years, where any attempt to determine whether or not a loss will occur, is pure conjecture.

Moreover, this Court in the *Maynard* case was careful to point out the precise limitations of its decision, and not to leave these to inference, however compelling such inference might be. The Court recognized that there were many contingent claims which were not provable, saying by Mr. Justice Stone:

> "That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor *and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. Re Merrill & Baker,* 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. *Riggin* v. *Magwire*, 15 Wall. 549. *Or the contingency may be such as to make any valuation of the claim impossible, even though liability has attached.* Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar* v. *Dunbar, supra*; see *Atkins* v. *Wilcox*, 105 Fed. 595." (Italics ours.)

This language applies directly to the instant cases. The only covenant of the bankrupts which has survived re-entry by the landlords is their covenant to indemnify against loss. Whether there will be a loss is an event exactly as fortuitous as whether the bankrupt would ever have been obliged to respond under the guaranty involved in *Re Merrill & Baker*. The contingency whether these landlords will gain or lose as a result of the breach of these leases is dependent on events no more capable of prediction than was the contingency as to whether Mrs. Thomas would survive her husband, which was held fatal to provability in *Riggin* v. *Maguire*. And it is significant that the final illustration given in Mr. Justice Stone's opinion, of a claim so contingent as to be non-provable, is *Atkins* v. *Wilcox*, the first in the long line of authorities holding that claims for future rent are not provable under the Bankruptcy Act of 1898.

We repeat that, where the parties to a lease have not provided for the payment of liquidated damages by the tenant, the courts cannot supply a covenant to that effect.

POINT III.

THE REFUSAL BY CONGRESS TO EXTEND TO OTHER PROCEEDINGS IN BANKRUPTCY THE PROVISIONS OF THE AMENDATORY BANKRUPTCY LAW OF MARCH 2, 1933, WHICH RENDERED FUTURE RENT CLAIMS PROVABLE IN PROCEEDINGS UNDER THE SECTIONS THEN ADDED TO THE BANKRUPTCY ACT, SHOULD MAKE THIS COURT RELUCTANT TO CHANGE THE ESTABLISHED RULE AGAINST THE PROVABILITY OF THE CLAIMS HERE INVOLVED.

Where the construction of a statute has been established and it has thereafter been repeatedly re-enacted or amended in other respects by Congress, the courts are necessarily reluctant to adopt a different construction.

> *United States* v. *Ryan*, 284 U. S. 167 (1931);
> *Carroll Electric Co.* v. *Snelling*, 62 F. (2d) 413 (C. C. A. 1st, 1932).

In the *Snelling* case, the Court of Appeals for the First Circuit applied this principle in construing Section 57n of the Bankruptcy Act of 1898 in accordance with a decision of a District Court made in 1910, the Court saying:

> "This decision was made twenty-two years ago. The Bankruptcy Act has been several times substantially amended, the last time in 1926. As already noted, section 57n was then amended by halving the period of one year for ordinary creditors. But Congress did not see fit to amend the balance of this section, so as to prevent the proof of claims unless the liquidating litigation was begun within six months. This court would not be warranted in assuming that the learned lawyers in Congress, active in the genesis of the amendments adopted, were ignorant of this well-reasoned opinion. In 2 Remington Bankruptcy (3d Ed. [1923]) §878, the opin-

ion is regarded by this leading writer on bankruptcy as of sufficient importance to warrant nearly two pages of quotation therefrom. *Under such circumstances, this considered opinion of an experienced and distinguished judge may fairly be regarded as adopted by the lawmaking body.*"

As above stated (pp. 26-27, *supra*), the rule that future rent claims are not provable under the Bankruptcy Act of 1898 was declared by the Court of Appeals for the Fifth Circuit in 1900, by the Court of Appeals for the Eighth Circuit in 1905, by the Courts of Appeals for the First and Second Circuits in 1910, by the Court of Appeals for the Ninth Circuit in 1915, and by the Court of Appeals for the Sixth Circuit in 1926. While the precise point had not been squarely raised in this Court, approval of the decisions below had been strongly indicated, particularly by Mr. Justice Pitney, writing for the Court in the *Auditorium* case in 1916, and by Mr. Justice Holmes, writing for the Court in the *Filene* case in 1918. Between 1898 and 1933, the Bankruptcy Act was seven times amended, amendments of great importance having been made in 1910 and in 1926.* On none of these occasions did Congress in any way modify the section defining provable claims.

The present situation, however, is not merely one of amendments to the Act which do not purport to alter the established rule of construction, *but of an amendment which expressly provides for a different rule in a new category of proceedings.* By the Amendatory Bankruptcy Law of March 3, 1933, c. 204, 47 Stat. 1467, Congress added to the Bankruptcy Act new sections authorizing proceedings for compositions and extensions to debtors, for agricul-

* Acts of February 5, 1903, c. 487, 32 Stat. 797; June 15, 1906, c. 3333, 34 Stat. 267; June 25, 1910, c. 412, 36 Stat. 838; March 2, 1917, c. 153, 39 Stat. 999; Jan. 7, 1922, c. 22, 42 Stat. 354; May 27, 1926, c. 406, 44 Stat. 662; Feb. 11, 1932, c. 38, 47 Stat. 47.

tural compositions and extensions, and for the reorganization of railroads engaged in interstate commerce. Congress provided that in two of these new types of proceedings claims for future rent should constitute provable debts and be liquidated under Section 63b.*

There is simply no evidence to support the argument of the petitioners that these provisions were meant to be declaratory of the existing law. The whole tenor of the amendment is to the contrary. The petitioners argue (p. 59 of their brief) that "Congress would not have referred to them [*i. e.*, future rent claims] as provable or not if it intended to treat them as not provable under prior law." The obvious answer is that the provision related not only to future rent claims but to "all claims of whatever character", many of which, of course, were provable under prior law. The petitioners also rely on the absence of provision as to the application of the amendment to "pending proceedings". The necessity for such provision in an amendment which applied only to the new types of proceedings authorized by its terms, is not apparent. We submit that the only possible construction of the provisions in question

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* The relevant provisions are:

"Section 74. Compositions and Extensions.—(a) * * * The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. * * * The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act."

"Section 77. Reorganization of railroads engaged in Interstate Commerce.—(b) * * * The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act."

was that made by the court below. As stated by Judge Learned Hand in the opinion in No. 505 (R. 29), Congress

> "* * * changed the law in this precise respect in one situation, but did not do so in this."

The considerations which led to the making by Congress of these special provisions that future rent claims should be provable in proceedings under the sections added to the Bankruptcy Act by the Act of March 3, 1933, are clear. The purpose of Congress was to give relief of the broadest character to individual debtors seeking the benefit of the provisions of the amendment. This purpose would be frustrated if certain creditors might insist on full performance from the debtor because their claims were not of a character provable in ordinary proceedings in bankruptcy. The necessity, for this reason, of broadening the definition of provable claims in proceedings under the new sections, was stated on the floor of the Senate by Senator Hastings who had charge of the bill. He said (76 Congressional Record 4906):

> "* * * we have undertaken in these sections to include all the claims that could be had against a debtor so that when he got relief, he might know that he had relief from every kind of a claim that might be had against him."

In other words, the special provision in Section 74 was enacted as a boon, not to landlords, but to individual debtors availing themselves of the provisions of that section.

It is significant that Congress appears to have thought that it was not enough to make provable in proceedings under the new sections, "all claims of whatever character against the debtor or his property * * * whether or not such claims would otherwise constitute provable claims

under this Act". Special mention was thought necessary to bring claims for future rent within the area of provability. Such "claims" differ essentially from other claims (such as for torts) excluded from provability by Section 63a of the Act of 1898. A cause of action sounding in tort is nevertheless a claim. It is not provable since it is not a claim "founded upon an open account, or upon a contract express or implied". *Schall* v. *Camors*, 251 U. S. 239 (1920). Quite different are "claims" such as those here involved. No judgment could have been recovered in respect of them at the date when the petition was filed. Language permitting proof of "all claims of whatever character" might not suffice to make provable something which was not properly a claim at all.

Congress thus believed very specific enactment to be necessary in order to render claims for future rent provable even under the broad language of Sections 74 and 77. Had Congress desired to change the rule as to such claims applicable in ordinary proceedings in bankruptcy, it would have found no difficulty in devising language to that end. Surely, in the face of this recent refusal by Congress to alter the rule established under prior Bankruptcy Acts and by a long line of decisions under the Act of 1898, this Court should not now adopt a different rule, when in the Court's own language in the *Maynard* case, "overturning the established practice would have such far-reaching consequences".

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1933.

Nos. 505-506.

MANHATTAN PROPERTIES, INC.,

vs.

IRVING TRUST COMPANY.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

vs.

IRVING TRUST COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF JOSEPH F. MANN, AMICUS CURIÆ, COUNSEL FOR NATIONAL ASSOCIATION OF BUILDING OWNERS AND MANAGERS.

Agreeable to the permission of the Court this brief is filed in the hope that it will prove helpful in the solution of the questions involved.

Statement.

This brief is submitted in support of the following proposition.

The landlord suffers damage when his tenant becomes bankrupt—claim for such damage may be liquidated under Section 63(b) of the Bankruptcy Law. In this respect a lease is no different from other executory contracts. This proposition is dictated by public policy—to decide otherwise would be to approve the use of voluntary bankruptcy proceedings by corporations for the purpose of obtaining, with impunity, cancellation of leases. This proposition is supported both by the trend of the decisions of this Court and by the recent Amendment to the Bankruptcy Act.

On behalf of The National Association of Building Owners and Managers which through its membership represents practically every important office building and thousands of loft buildings and apartment houses in practically every important city in the United States, improved properties assessed for taxes at more than seven billion dollars, we welcome this opportunity as *amicus curiæ* to present to this Court the deplorable legal status of the landlord when his tenant becomes bankrupt, a status now considered by this Court for the first time.

The other parties to these appeals will discuss the legal theories involved. We limit ourselves to pointing out some practical results of the standing interpretations of the Bankruptcy Law—results which we deem contrary

to the intention of Congress, contrary to the needs of society, contrary to the spirit of justice.

When a tenant files a petition in bankruptcy the landlord, under existing decisions in the District Courts and Circuit Courts of Appeal (the leading case in the Second Circuit is *In Re Roth and Appel*, (1910) 181 Fed. 667, 31 L. R. A. (N. S.) 270) is a creditor to the extent of rent due and unpaid at date of bankruptcy only. The landlord is not a creditor as to any rent or other lease obligation which was not due on that date. Of course, such rent and other obligations subsequent to bankruptcy are not wiped out by bankruptcy under these decisions. But if the bankrupt is a corporation, claims for such rent or other obligations subsequent to bankruptcy are valueless—all the property of the corporate bankrupt has passed to the Trustee in bankruptcy for distribution among the "creditors." The corporate bankrupt ceases to function, the claim of the landlord for future rent may exist theoretically—but not practically.

This state of the law would be unsatisfactory enough, but picture the dissatisfaction of landlords with the next development.

A voluntary petition in bankruptcy may be filed by a solvent person—in a voluntary petition no allegation of insolvency is necessary. Accordingly, a solvent, substantial, successful business concern can use bankruptcy to relieve itself of its lease obligations by filing a voluntary petition in bankruptcy. This is not only a possibility, it is a fact.

May we take the Court outside the record and picture a typical bankruptcy of this latest model. A solvent, sub-

stantial successful corporation—a chain store retail sales organization, owned say by the manufacturer whose goods it distributes—desires to relieve itself of its leases. It first organizes subsidiary corporations to take over its operation. It next files a voluntary petition in bankruptcy. Its receiver or trustee takes over its assets—stock of subsidiary operating companies. The old management continues—the loss and damage of receivership operation is eliminated or at least minimized. The trustee disaffirms all unprofitable leases. The subsidiary companies negotiate new leases for the stores on present market conditions. Then the former parent company—the manufacturer—makes an offer to the trustee to buy back the business and assets of the bankrupt. There is no other possible purchaser because the good will of these stores is associated with the manufacturer's product. The offer is accepted. A dividend (sometimes 100%) is paid to the "creditors."

But the landlords are not "creditors." The merchandise creditor is paid a dividend on his claim. Even the creditor with a contract for future goods will receive a dividend. The only contract obligation which remains completely unsatisfied is the lease obligation.

Is it any wonder that landlords generally feel outraged by the chain store bankruptcy "racket"?

Landlords recognize that bankruptcy laws are necessary—that it is in the interest of society in general that the embarrassed debtor should on surrender of his property be permitted a new start—that the creditor himself is benefitted by such surrender—that the loss which the creditor must suffer on the bankruptcy of his debtor is

part of the price he must pay to conduct his business as a member of society. What the landlord does not understand is why the brunt of such loss must be borne by the landlord.

Is the lease only a scrap of paper in bankruptcy?

These practical considerations are advanced because the doctrine of *In Re Roth and Appel* is based on practical grounds. These practical grounds, we believe, no longer are controlling. The doctrine that future rents are not provable in bankruptcy is not based upon the expressed will of Congress, but is the result of decisions of certain of the District Courts and Circuit Courts of Appeal that such claims are too contingent to be susceptible of proof. It is thought that these courts must have been, at least unconsciously, motivated by historical dogma in refusing to extend to leases the more liberal modern theories of proving in bankruptcy debts not yet matured. As Mr. Justice Holmes has said in *Gardiner* vs. *Butler & Co.*, (1918) 245 U. S. 603: "But the law of leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."

The modern law is expounded by *Maynard* vs. *Elliott* (1931), 283 U. S. 273, 51 S. Ct. 390, 75 L. Ed. 1028. At least it can now be stated that mere contingency is no objection to the proof of a claim. The test seems rather to be uncertainty amounting to mere speculation. As Judge Learned Hand said in his opinion in the *Manhattan Properties* case, 66 Fed. (2nd) 470, it would be "hard to find an instance in which the amount of the claim could be more uncertain" than in *Maynard* vs. *Elliott, supra,* unless it was assumed that the endorser's

liability there allowed as a provable claim, would mature before the completion of the bankruptcy proceedings.

The liability for rent is obviously not uncertain in that it is beyond the landlord's control; it does not depend upon an event so fortuitous as to make it uncertain whether liability will ever attach, it has already attached at and before the bankruptcy; nor is the "contingency" such as to make any valuation of the amount of the claim impossible, it is simply a matter of mathematics based upon well known standards of appraisal and less subject to eventual error than the claim in *Maynard* vs. *Elliott, supra.*

The rule of *Maynard* vs. *Elliott, supra,* must be applied to future rents. The decisions in the court below were made on one basis only, *stare decisis.*

There is also ample basis for reversals upon a consideration and application of legislation now in force. The amendment, effective March 3, 1933, to the Bankruptcy Act, added the following as a part of Section 74(a), 11 U. S. C. A., Sec. 202(a):

> "A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act."

Section 63(b), 11 U. S. C. A., Sec. 103(b), is a part of the general Bankruptcy Act.

The argument frequently advanced that this sentence does not constitute a general amendment to the Act itself and has no force except in the extension proceedings otherwise provided for by the balance of Section 74(a), is

contrary to reason. The extension proceedings are complete with respect to landlords' claims for future rent without this sentence. In such proceedings, in that section described, creditors' claims are termed "debts" and it is stated:

> "The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act."

There is no sensible meaning to "liquidation" of a future rent claim under an extension proceeding. There is no adjudication, no distribution; and in fact, rental payments are already "extended" by the terms of the lease. It cannot be supposed that it was intended to give the landlords a right of such little benefit as a voice in extension proceedings only.

The intention of Congress is further disclosed from the debate in the Senate, the pertinent parts of which, as it appears on the "Congressional Record", are set forth as an appendix to this brief.

Senator Hastings, who was in charge of the Bankruptcy Act, and Senator Bratton, who offered the amendment making a claim for future rent a provable debt, believed that this was "an amendment affecting the rents under the whole law" (Appendix p. 11), and for this reason the amendment was temporarily withdrawn and later reintroduced by Senator Bratton and accepted by Senator Hastings when there was no longer any danger that this amendment

to the Bankruptcy Law generally would get the whole amendment into controversy (Appendix p. 12). It was, therefore, the conscious intention of Congress by these words to amend the Bankruptcy Act generally.

The amendment as to future rent was designedly intended to apply to all bankruptcy proceedings, either pending at the date of the enactment of the amendment or thereafter commenced. Section 2 of the amendatory act provides that it shall apply to all concerned, whether their interests or debts were acquired or incurred prior to the effective date of the Act, or thereafter, and that proceedings under Section 1 thereof "may be taken in proceedings in bankruptcy which are pending on the effective date of this Act."

We respectfully submit that the Bankruptcy Act permits the landlord to prove a claim in a tenant bankruptcy for such loss as the landlord may be expected to suffer by reason of the bankruptcy.

Respectfully submitted,

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Appendix.

CONGRESSIONAL RECORD—SENATE—FEBRUARY 24, 1933—PP. 5058-9:

Mr. Bratton: Mr. President, may I have the attention of the Senator from Delaware? I desire to offer two amendments that relate to the same subject matter. I believe the Senator from Delaware will accept them.

On page 41, line 8, after the word "property," insert "including a claim for future rent."

Mr. Hastings: I certainly thought I had that in the section. I may say to the Senator that a great many applications have been made to me with respect to that, and I saw no objection to putting it in; but it may be that I did not get it in this particular section.

Mr. Bratton: I think it is not.

On the next page I desire to offer another amendment which relates to the same matter. I think both of them will be acceptable.

Mr. Hastings: May I inquire just where the Senator proposes to put that, please?

Mr. Bratton: On page 41, line 8, after the word "property," insert "including a claim for future rent."

Mr. Hastings: I have no objection to that amendment.

The Presiding Officer: The question is on agreeing to the amendment offered by the Senator from New Mexico to the amendment of the committee.

The amendment to the amendment was agreed to.

Mr. Bratton: Then, Mr. President, on the next page, page 42, line 6, after the period, I move to insert: "A

claim for future rent shall constitute a provable debt, and shall be liquidated under section 63 (b) of this act."

Mr. Hastings: Mr. President, will the Senator yield?

Mr. Bratton: I yield.

Mr. Hastings: Referring to the language just written into line 8, page 41, which I said I thought was in this section, I ask the Senator whether he has considered, on page 42, the language beginning in line 1?——

> The term "creditor" shall include for the purpose of an extension proposal under this section all holders of claims of whatever character against the debtor or his property, including a claim for future rent.

Mr. Bratton: Yes; I had considered that, but that describes the holder of the claim.

Mr. Hastings: I have no objection to the other amendment.

Mr. Bratton: I thought the definition of "debt" should include an express provision respecting future rent.

Mr. Hastings: Now, may we have the second amendment stated?

The Presiding Officer: Will the Senator send up his amendment?

Mr. Bratton: I send up the amendment, to be inserted on page 42, line 6, following the period.

The Presiding Officer: The amendment to the amendment will be stated.

The Legislative Clerk: On page 42, line 6, following the period, it is proposed to insert a new sentence, reading as follows:

> A claim for future rent shall constitute a provable debt, and shall be liquidated under section 63(b) of this act.

Mr. Hastings: I inquire of the Senator from New Mexico whether that is not an amendment affecting the rents under the old law. As I stated this morning, there are so many things that various people want corrected in the old statute that I was very much afraid to get into it for fear we would get into a great deal of trouble in connection with it; and I have sought in this bill in the other sections to prevent any controversy arising under the old act. Therefore I intended that those words should apply to these particular sections.

Mr. Bratton: Mr. President, I concur with the Senator that we should free ourselves of any contact with the old act; and I think I shall withdraw the amendment. I do not care to go into the old act. I think we should not do so.

Mr. Hastings: I thank the Senator.

Mr. Bratton: Let me ask the Senator from Delaware whether he thinks that with the amendment already adopted on page 41, line 6, a claim for future rent could be established and receive the same consideration and the same disposition under this measure that any other claim or any other debt would receive?

Mr. Hastings: Does the Senator mean without its being written in there?

Mr. Bratton: No; with the amendment already adopted.

Mr. Hastings: I have not any doubt of it, with the amendment already adopted; and my own notion about it was that it would be true without having it written in there at all, because we have undertaken in these sections to include all the claims that could be had against a debtor, so that when he got relief he might know that he had

relief from every kind of a claim that might be had against him.

Mr. Bratton: Mr. President, temporarily I shall withdraw the amendment offered at page 42, line 6.

CONGRESSIONAL RECORD—SENATE—FEBRUARY 27, 1933—P. 5278:

Mr. Bratton: Mr. President, let me say to the Senator from Delaware that on Saturday I offered an amendment, to come in on page 42, line 6, and withdrew it temporarily. It was in this language:

> A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this act.

Upon further consideration I think that amendment should be included in the bill, and I hope the Senator will accept it.

Mr. Hastings: Mr. President, the Senator from New Mexico will recall that the only reason I objected to it was because I was afraid it would open the door to amendments to the general bankruptcy law. If we are now in a position where we are about to vote on the bill to-night and there is no danger of our getting into controversy by trying to amend the bankruptcy law generally, I will accept the amendment.

Mr. Bratton: I think, Mr. President, that such an amendment as I have offered is necessary in order to give the relief needed.

The Presiding Officer: The amendment offered by the Senator from New Mexico to the amendment will be stated.

The Chief Clerk: On page 42, line 6, after the word "act," it is proposed to insert the following:

> A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this act.

The Presiding Officer: The question is on agreeing to the amendment offered by the Senator from New Mexico to the amendment reported by the committee.

The amendment to the amendment was agreed to.

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IN THE

Supreme Court of the United States

October Term, 1933

No. 505

MANHATTAN PROPERTIES, INC., *Petitioner*,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners*,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF MARY P. HALE, CLARISSA HALE STUDDERT-KENNEDY, AND STERLING FURNITURE COMPANY, AS *AMICI CURIAE*.

The *Amici Curiae* are landlords having claims in the bankruptcy of F. & W. Grand 5-10-25 Cent Stores, Inc., a chain store corporation now in bankruptcy in the United States District Court for the Southern District of New York. They file this brief in support of the petitioners herein.

POINT I.

The petitioners' claims are susceptible of valuation by methods familiar in liquidation proceedings and in cases of anticipatory breach of contract, viz., by determining the present value of the contract. *Hermitage Co.* v. *Levine*, 248 N. Y. 333, is not applicable.

We do not understand that the respondent argues that the difference between rent reserved and reasonable rental value is incapable of being ascertained. The respondent challenges, rather, the right of the petitioners to evaluate their claims on that basis, and contends that they are entitled only to prove for instalments of rent which were overdue when the petition in bankruptcy was filed.

This argument disregards the fact that the standard and accepted method of evaluating a claim on a defaulted forward contract is to take the present value of the contract as the measure of loss. This is true both in liquidation proceedings, that is, in bankruptcy and in equity administration suits, and also in actions for anticipatory breach of contract.

This Court so held in an early case, *Carr* v. *Hamilton*, 129 U. S. 252. There the Court had occasion to consider the effect of the bankruptcy (under state law) of a life insurance company upon its outstanding policies. It said (p. 256):

> "By that act [of becoming bankrupt] the company becomes *civiliter mortuus*, its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies * * *."

The holding therefore was that a policyholder *had a then existing claim for the present value of his policy* against the liquidating agent of the insurance company. It was not necessary to wait on future events in order to liquidate the claim. To the same effect is *Lovell* v. *St. Louis Life Insurance Co.*, 111 U. S. 264, 274. Both these cases were cited with approval by this Court in *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581, at page 589.

Furthermore, the decisions clearly hold that the present value of a forward contract must be determined by the difference between the amounts of payment reserved by the contract and the amounts of similar payments under a similar contract based on present current market values. Thus, in *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734, the Circuit Court of Appeals for the Second Circuit, in discussing the amount provable in an equity receivership proceeding by a claimant who had been deprived by the defendant's insolvency of a forward contract, said (p. 738):

> "The law seeks to give to the injured person the value of the contract of which he has been deprived, no more and no less, and the question here is: What was that contract right worth on October 30, 1920 [the date of the appointment of Receivers]? And the answer is that such sum is to be determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract."

The way the rule works is illustrated by another case, involving the bankruptcy of a seller of ice, where the market value of forward deliveries under a long-term instalment contract had increased. In *In re Stern*, 116 Fed.

604, the Circuit Court of Appeals for the Second Circuit considered whether the buyer had a provable claim against the defaulting seller in bankruptcy. It said (p. 608):

> "* * * petitioners could not replace the contract without suffering a direct loss much in excess of $500, and * * * were creditors for the requisite amount, and were not obliged to await the expiration of the time for which the contracts were to continue."

This Court cited the *Stern* case with approval in the *Chicago Auditorium* case, and also the case of *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721. In this last case, an equity receivership proceeding, the Circuit Court of Appeals for the Second Circuit held that the loss of an advantageous contract to operate express cars over the lines of the insolvent defendant street railway company for thirteen years in the future was provable, and stated its measure as follows: "Manifestly the claimant was entitled to recover the value of its contract" (p. 745).

The rule is analogous to, if not derived from, the method of ascertaining damages in actions based upon anticipatory breach of contract, as the method was set forth by this Court in *Rochm* v. *Horst*, 178 U. S. 1, at page 21:

> "Even if in such cases the manufacturer [the seller] actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle applies and he may show what was the value of the contract by showing for what price he could have made subcontracts, * * *

> "In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."

In the numerous cases in which creditors have been allowed to prove damages for the loss of advantageous forward contracts, present value of future performance has necessarily been the standard of measure. Thus with respect to proof upon an annuity contract, the provable claim was held to be the present value; for the actual loss depended on future events and was necessarily unknown. *Cobb* v. *Overman*, 109 Fed. 65 (C. C. A., 4th Circ.).

In the *Chicago Auditorium* case, this Court held, as we read the opinion, that the measure of loss is the difference between the contract amount and market value.

This Court in *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597, applied this doctrine to the evaluation of the loss of an advantageous lease, by holding that a covenant to pay the difference between rent reserved and rental value "was a personal covenant that liquidated the damages upon a footing that was familiar and fair." (245 U. S. 602).

As a matter of logic, the present value of a covenant to indemnify against loss would be the same as the value of the covenant considered in the *Filene* case. This Court recognized that fact in the *Filene* case itself by citing, as an illustration of the "familiar and fair" basis for liquidating the loss, the case of *Reading Iron Works—Sweatman's Appeal*, 150 Pa. St. 369. There the Pennsylvania Court held that a landlord whose lease contained a covenant of indemnity against loss upon which the insolvent had defaulted could prove in a liquidation proceeding, saying (p. 375):

> "The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated. * * * The demand * * * is for the loss he suffers by reason of the difference of the rentals now obtainable in consequence of the peculiar arrangement and construction of the premises and the rental agreed upon * * *."

In the English bankruptcy courts the same standard is applied. *Ex parte Llynvi Coal & Iron Co., In re Hide,* L. R. 7 Ch. App. 28.

When a landlord defaults upon a covenant of quiet enjoyment, it is held in most jurisdictions that

> "* * * recovery may be had at once for the value of the unexpired period of the lease; that is, the difference between the promised rent and the rental value of the term, or the difference between the contract price and the market price * * *" III *Williston, Contracts,* p. 2492.

Professor Williston cites numerous cases as authority for this statement.

The measure of damages for breach of a contract to give a lease is universally held to be the difference between payments reserved and the value of the contract based on the then market rental value. *Oldfield* v. *Angeles Brewing Co.,* 62 Wash. 260. In *Bondy* v. *Harvey,* 218 App. Div. 126, the New York Appellate Division for the First Department recognized the propriety of this method of ascertaining damages for the breach of a contract to give a long-term lease. (It reversed the judgment below on the sole ground that it failed to take into account the fact that distant future payments must be reduced to present-day value before being used for the calculation of damages.) In *Leo* v. *Pearce Stores Co.,* 57 F. (2d) 340, an equity receivership proceeding, the Court made a full and interesting review

of the authorities and arrived at the same standard as the correct measure of damage for the landlord who has lost an advantageous lease.

Hermitage Co. v. Levine Not Applicable.

As authority for the proposition that the provable claim is limited to accrued loss, rather than permitted to include actual loss based upon present value, the respondent relies on *Hermitage Co.* v. *Levine*, 248 N. Y. 333.

That case construed an indemnity clause as imposing a liability only after the expiration of the original term.

Hermitage Co. v. *Levine* was not a liquidation proceeding. *There was no occasion to evaluate future obligations.* The action was brought for instalments alleged to have accrued before the commencement of the action. It was simply a question of the construction of a contract: whether any such instalments had yet accrued; and the particular covenant in question was construed as imposing a delayed, rather than an immediate, liability.

The New York Court was not asked by the plaintiff to set a present value, and did not attempt to set a present value, on the contract. The only question was: under this contract had any obligations yet matured? The present value of a future obligation was in no wise involved.

Assuming that for some reason the New York Court had had occasion to evaluate the present worth of the contract, there is nothing in the opinion to suggest that it would have disagreed with the Pennsylvania Court in the *Reading Iron Works* case when it said (150 Pa. St. 375):

> "The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated."

POINT II.

The courts, both in bankruptcy and otherwise, have abundantly recognized the ascertainability of a salvage value to be deducted from the face value of future payments due.

Fundamentally, the question is whether the amount of salvage that the landlord can obtain over the remainder of the lease period is ascertainable. Cases cited under the preceding point have shown that the rental value of real property for periods of years in the future invariably has been regarded as ascertainable. It presents no insuperable obstacle to the working of the judicial process any more than do many other difficult and delicate problems of valuation.

In a number of cases the courts have ascertained present losses by making an appropriate deduction from a contracted payment, to represent salvage value, even though there was in such cases no recognized formula, such as difference between rent reserved and rental value, to guide the computation.

Pension Agreements.

Thus in *Pierce* v. *Tennessee Coal, Iron & Railroad Co.*, 173 U. S. 1, this Court held that damages for breach of a pension agreement could be ascertained, although saying that "deduction should, of course, be made of any sum that

the plaintiff might have earned in the past or might earn in the future" (173 U. S. 16).

Employment Contracts.

This Court in the *Chicago Auditorium* case cited with approval *Ex parte Pollard*, Fed. Cas. No. 11,252, holding provable in bankruptcy a claim for damages upon breach of an employment contract having eight years to run (240 U. S. 589, 592).

Secured Claims.

Another analogy is afforded by the rules with respect to computing the claims of secured creditors. The land is often spoken of as the landlord's security.

A secured creditor is ordinarily allowed to prove "for such sums only as to the courts seem to be owing over and above the value of their securities" (*Bankruptcy Act*, Sec. 57-e). Now the value that is used in this determination is the present value. If a creditor had a claim secured by mortgage bonds maturing in ten years and presently quoted on the Stock Exchange at, say, 80, the Court would obviously take the market value rather than devote itself to puzzling over whether the bonds would be paid in full at maturity. Similarly the present rental value of premises must be the standard; it is the best and the only standard that there is. It represents society's consensus not only on present conditions but of course on what is deemed likely to happen in the future.

POINT III.

The fact that rent "issues" from the land is not an argument against a claim for damages.

In a number of the early cases in the lower federal courts the landlords filed claims for total unaccrued rent. It was an appropriate argument against the provability of such a claim to advert to the legal principle that rent "issues" from the land, and that as the landlord had reoccupied the land no more rent was due.

But this is no answer, we submit, to a claim for damages for the loss of an advantageous lease.

The landlord is no more entitled to total unaccrued rent than a seller of goods on a forward contract would be entitled to prove for the entire sale price of the goods upon the bankruptcy of the buyer. But in the event that the market value of the goods for future delivery had meanwhile declined, the hypothetical seller could prove for the difference between the sale price and the market price—that is, the value of his contract. The agreed price is the consideration for future sales of goods, precisely as the agreed rent is the consideration for the future possession of land. A landlord should be allowed the same rights in a bankruptcy as a seller of goods.

Conclusion.

The conclusion should be that the claims of the petitioners are provable, not merely because of the presence of special indemnity covenants, but on the broad ground that a landlord's claim is provable in bankruptcy, with or without such clauses, just as is the claim of any other holder of a long-term contract.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1933

MANHATTAN PROPERTIES, INC,
Petitioners
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.
Respondent
No. 505

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD
Petitioners
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey Corporation
Respondent
No. 506

BRIEF FOR CREDITORS ADVISORY COMMITTEE OF McCRORY STORES CORPORATION AND CREDITORS COMMITTEE OF McLELLAN STORES COMPANY, AS *AMICI CURIAE*

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BRIEF FOR CREDITORS ADVISORY COMMITTEE OF McCRORY STORES CORPORATION AND CREDITORS COMMITTEE OF McLELLAN STORES COMPANY, AS *AMICI CURIAE*

This brief is submitted on behalf of the Creditors Advisory Committee of McCrory Stores Corporation and the Creditors Committee of McLellan Stores Company.

The brief is designed to emphasize certain practical considerations inherent in the interest which merchandise creditors have in the important question now before the Court. No attempt is made to cover the general themes argued at length in other briefs. We venture merely to bring to the Court's attention the practical consequences as regards mercantile credit, the entire credit system and the claims of merchandise creditors in bankruptcy if the contentions now advanced by the landlords are sustained.

These practical considerations may be readily illustrated:

In the Blyn Shoe insolvency proceeding the merchandise and loan creditors aggregate approximately $500,000, whereas the claims filed for breach of leases aggregate approximately $2,900,000.

In the McLellan Stores bankruptcy the general claims for merchandise, money loaned and expense items aggregate less than $2,000,000, while the claims filed for future terms of leases aggregate $3,900,000, with many of the landlords not filing for the future terms in view of the uniform rulings of the bankruptcy courts that such claims were not provable.

In the McCrory Stores bankruptcy the merchandise and loan creditors aggregate approximately $9,000,000, whereas the claims of landlords for future terms are something like $43,000,000.

Illustrations such as these demonstrate that if the claims of landlords for future rents or for the supposed value of future terms were held provable in bankruptcy, the entire credit system would have to be revised; financial statements would have to include contingent and fluctuat-

ing liabilities which now never appear therein; and merchants and lenders would be obliged to insist upon absolute security lest some landlord or landlords might absorb practically the entire estate in the event of insolvency.

The entire credit structure and the approval and passing of credits rest upon the assumption that contingent claims for future rent relate to something which this Court has said "issues from the land (and) is not due until the rent day" (*Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 601), and is therefore not to be regarded as a liability provable in bankruptcy.

No person giving credit could with certainty determine from a financial statement the ability of the debtor to pay, if he were obliged to take into consideration the possibility of claims for damages arising from leases. Any such person would be compelled to stop and ascertain the conditions and circumstances of every lease of the debtor, obtain expert opinion as to the possible extent of the liability represented by it in the event of the debtor's insolvency, and gamble upon all the fluctuating values of real estate over a long period of time.

Either the long term lease would disappear from business life because no concern could obtain credit if it had potential provable liabilities existing over long periods of time, or else the free circulation of mercantile credit would be checked, and general business would be obliged to resort to a much greater use of cash in making purchases or to a much greater use of collateral security in support of credit.

Economists are generally agreed that a freer use of commercial credit is essential to lifting this country out of the disastrous consequences of the present depression. But the contentions of the landlords would have the very

opposite effect upon credit, and to that extent would make the task of effecting national recovery appreciably more difficult. In other words, the contentions of the landlords are economically as well as legally wrong, and they do not harmonize with sound public policy.

Furthermore, the landlords start with one big and very valuable preference and advantage over general merchandise creditors, and to that preference a second should not be added. The landlord always gets his property back; the merchandise creditor never does. The landlord at all times has the security of his own property, whereas the general merchandise creditor has no security. In the event of the insolvency of the tenant, the landlord is free to re-rent the property for any figure which the future real estate market over a period of years may make possible, and he is free to sell the property outright at any time and seek recoupment from the proceeds. The merchandise creditor cannot expunge or mitigate his loss out of the property which he has sold, and certainly he cannot recover and resell it.

The usual lease is drawn with far more careful consideration for the rights of the landlord than for the rights of the tenant. The landlord seeks to bolster his right to recover the property by every conceivable device and language; and in bankruptcy the usual claims presented by landlords are claims based upon covenants which do not contemplate ordinary current financial obligations but seek to secure the landlord out of the assets of the bankrupt estate at the expense of the general creditors. Nearly every important lease contains an agreement, exacted by the landlord, which tends to defeat the beneficent design of the Bankruptcy Act to bring about an equitable

distribution of the bankrupt estates among creditors holding just demands based upon adequate considerations. In all provisions in leases which seek to govern the situation after bankruptcy, the tenant and the landlord have both contracted with the Bankruptcy Act in mind. The tenant is in the position of really caring nothing about the rights which he gives the landlord after bankruptcy has divested him of control and enjoyment of the property; and neither he nor the landlord has much interest in the dividends going to general creditors.

In *Kothe* v. *Taylor Trust*, 280 U. S. 224, this Court pointed out the importance of the very considerations which we are now urging. There, in a lease for two years the lessee had agreed that the mere filing of a petition in bankruptcy against him should be deemed a breach, and that thereupon *ipso facto* the lease should terminate and the lessor become entitled to re-enter and also to recover damages equal to the full amount of the rent reserved for the remainder of the term. The lessee became bankrupt, and the lessor claimed $5,000, equal to fifteen months' rent. This Court held that the claim could not be enforced against the trustee in bankruptcy since the provision in the lease must be regarded as one for a penalty apparently designed to insure to the lessor preferential treatment in the event of the lessee's bankruptcy. At page 226 this Court said:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge."

And on page 227 this Court said:

> "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor. Considering the time which the lease here involved had to run, nothing else appearing, it seems plain enough that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy. The record discloses no circumstance sufficient to support a contrary view. If the term were much shorter, or there were facts tending to disclose a proper purpose, the argument in favor of the lessor would be more persuasive."

Thus, as this Court has pointed out, the landlord who contracts for rights after bankruptcy knows that he is contracting for a distributive share in assets as against creditors who, as a rule, are in a different class altogether, are not getting their property back, and in the nature of things cannot stipulate for special consideration in the event of bankruptcy.

In this *Kothe* case this Court declared that the argument of the landlord might be much more persuasive if the "term (of the lease) were much shorter." The term in that case was only two years. What then will this Court have to say of situations where the terms of the leases run from ten years to ninety-nine years?

Furthermore, general merchandise creditors whose goods have created the bankrupt's business take the risks of the commercial vicissitudes and cycles of the immediate future, whereas the contingent claims of landlords

under long term leases would value the whole term on a fixed and absolute basis. The landlord's contention, therefore, presents the anomaly that the longer the lease the less likelihood of ultimate loss to the landlord through re-entry and re-letting, but at the same time the greater proportion of the bankrupt estate which would be absorbed by the landlord. If, in such case, the landlord's claim for the future term is provable, he may collect his dividends and at the same time actually realize in the future out of the property more than enough to equal 100% of his claim; whereas the merchandise creditor can never have (to use colloquial language) any such "ace-in-the-hole." The landlord under a long term lease who recovers his property as the result of bankruptcy may recoup himself against the consequences of any temporary business depression, but the consequences of such business depression to the credit extended by the merchant or lender of money is final and irretrievable.

It can be justly said that our system of credit is based, and for many decades has been based, on the settled rules of law which the landlords now seek to change. Those rules of law have built themselves into the whole credit and commercial structure. As a result of their long acceptance, balance sheets never show liability for future rent, either as a fixed or contingent liability; banks lend money and merchants supply merchandise on the strength of balance sheets which omit such items; credit managers do not inquire into any such remote sources of liability; and the universal assumptions of the business world have been that in the event of insolvency the general creditors could look to the tangible assets and the landlord could look to his own recovered property. During the present depression many important businesses have been saved by

temporary advances of credit made upon these very assumptions; and the landlords have had the benefit thereof, for their tenant has thereby been tided over the momentary exigency. Had it been believed that some contingent claim of the landlord on a long term lease could be provable in bankruptcy against the assets created by the credit extended, that necessary and life-saving accommodation would never have been extended at all, for the consequence might then be that the landlord would get his property back and at the same time absorb all the avails of such credit without any liability connected with it.

We respectfully submit that these commercial practices and assumptions based upon rules of law of long standing should not be upset except for the most impelling reasons. To suddenly change the "rules of the game" in the midst of the present depression would almost be the equivalent of defrauding, and would certainly be the equivalent of destroying, large numbers of merchandise creditors and lenders of money. If it is proper that the rules be changed at all, the changes should be made solely by Congress and then only as to future cases.

This Court, in *Maynard* v. *Elliott,* 283 U. S. 273, when passing upon the right of a holder of a note to prove against the endorser, observed that a certain rule of law had been adopted by the 2nd, 3rd and 9th Circuits and also by the District Courts generally, and then said:

> "Only compelling language in a statute, itself, would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far-reaching consequences as in the present instance."

The rule that the future term of a lease, whether valued in terms of rent or damages, is not provable in bankruptcy, has been held as follows:

First Circuit— *Slocum* v. *Solliday*, 183 Fed. 410;
McDonnell v. *Woods*, 298 Fed. 434;

Second Circuit— *In re Roth & Appel*, 181 Fed. 667;
In re Barnett, 12 Fed. (2) 73;

Fifth Circuit— *Atkins* v. *Wilcox*, 105 Fed. 595;
Trust Co. v. *Whitehall Holding Co.*, 53 Fed. (2) 635;
Orr v. *Neilly*, 67 Fed. (2) 423;

Sixth Circuit— *Wells* v. *23 St. Realty Co.*, 12 Fed. (2) 237;

Seventh Circuit—*In re National Credit Clothing Co.*, 66 Fed. (2) 371;

Eighth Circuit— *Watson* v. *Merrill*, 136 Fed. 359;
Barton v. *Western Iowa Co.*, 9 Fed. (2) 488;

Ninth Circuit— *Coleman* v. *Withoft*, 195 Fed. 250.

The same doctrine is followed in New York under the Assignment for the Benefit of Creditors Act.

Matter of Havenor, 144 N. Y. 271;
Kottler v. *The Bargain House*, 242 N. Y. 28.

Countless District Courts have held that the future term of a lease is not provable, whether presented as damages or rent.

One further consideration presents itself. The landlords have the almost uniform practice of incorporating in the lease a clause to the effect that on the filing of a petition in bankruptcy, the lease may be terminated and the landlord may repossess himself of the premises. This clause has effectively been used by landlords when lease values were rising to take over their property and deprive the estate of any of the benefits of enhancement. On the other hand, when the value of the leasehold decreases, the landlord seeks to assert damages and share with the general creditors. In colloquial language, the landlords win on either "heads or tails," and the creditors lose.

This Court has already emphasized the distinction between contracts governing realty and contracts governing personalty. The doctrine of anticipatory breach has no application to real estate since the law of real estate became fixed long prior to the rise of that doctrine. Neither the failure to pay rent nor the filing of a petition in bankruptcy is in itself and at common law an anticipatory breach of the lease. As stated by this Court in *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 601:

> "Rent issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let."

And as stated by this Court in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, 605:

> "The law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

See also:

Wells v. *23 St. Realty Co.*, 12 Fed. (2) 237;
In re Service Appliance Co., 39 Fed. (2) 632.

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Supreme Court of the United States

OCTOBER TERM—1933

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

—against—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of owners of real property who have filed proofs of claim herein or in other bankruptcy proceedings, the ultimate disposition of which may depend upon the final decision in this case and the companion case of *Manhattan Properties, Inc.* v. *Irving Trust Co.* There is but one general question of law presented in both cases:

> Where a lease of real property provides that if the tenant is adjudicated bankrupt the landlord may reenter and the tenant shall indemnify the landlord against all losses of rent during the balance of the term, and where the landlord reenters within the six months period for filing claims, is the obligation of the tenant a provable debt?

This is solely a federal question, involving the construction of the Bankruptcy Act. No question of local law is

involved. The question is not whether under the local law the bankruptcy of the tenant constitutes a breach entitling the landlord to sue at law for damages resulting from the entire nonperformance of either the rent or the indemnity covenant if so, there would be a liability absolutely owing at the date of the petition, clearly provable. The question is whether, irrespective of local law, the indemnity agreement constitutes or supports "a debt, demand or claim provable in bankruptcy."

The question has never been decided by this Court. Until so decided, it will give rise to constant litigation, for neither the bar generally nor the federal courts in certain of the circuits will accept as final the doctrine of *Roth & Appel*, 181 Fed. 667. Many lawyers and legal writers share the view of Judge Learned Hand, expressed in the opinion in the *Manhattan Properties* case, that the decision in *Maynard v. Elliott*, 283 U. S. 273, has cut away the sole ground upon which *Roth & Appel* was supportable.*

The doctrine of the latter case has resulted in grave abuse, particularly in connection with chain store corporations which, although solvent in many cases, have resorted to voluntary bankruptcy as a vehicle for corporate reorganization. Resulting conditions, which have reached the proportions of a nation-wide scandal, have been recently summarized as follows:

> "The practical consequence of this rule [*i. e.* the doctrine of *Roth & Appel*] is that corporations whose assets greatly exceed their liabilities may file a petition in bankruptcy, and by the simple expedient of forming a new corporation to purchase the business of the bankrupt corporation, they are able to repudiate their leases. Certain it is that many large business organizations, some of them with chains of

* This view is ably presented by W. S. Schwabacher and S. C. Weinstein in their article "Rent Claims in Bankruptcy", 33 Col. L. Rev. 213, where the general subject is exhaustively briefed.

> stores throughout the United States, are filing voluntary petitions in bankruptcy primarily to avoid burdensome leases, and the landlords appear to be without remedy. Many others, by reason of this situation, are able by threat of bankruptcy, to procure from their landlords rent reductions to which they are not entitled. But one step removed from the landlords are the banks, building associations and insurance companies who have financed the leased premises and whose security is impaired by vacancies and consequent loss of income. So urgent has this problem become that the National Association of Credit Men has recently urged the arbitration of lease difficulties to avoid this abuse of the Bankruptcy Act."
>
> Effect of Bankruptcy Upon Leases of Real Property, by Elias Marks, 7 Univ. of Cinc. L. Rev. 162.

That the Court, if it grants the writs prayed for, should reverse the decisions below, is apparent upon grounds of logic, policy and fairness.

Every contractual promise creates a duty forthwith on the making of the contract (Restatement, Contracts, §250, *Comment c.*). Since it is no objection to the provability of a contractual obligation that it is conditional at the date of the petition (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549; *Maynard* v. *Elliott*), every contractual duty*, provided only that it is capable of valuation, logically should be provable—and that is the rule adopted by the American Law Institute (Restatement, Contracts, §324).

There is no objection to the provability of the claims that the doctrine of anticipatory breach has been said not to apply to agreements to pay money only or to leases of

* Of course, if the nature of the duty is such that the deprivation of the promisor's assets does not disable him from performing, *e. g.*, a personal service contract, there is no claim. Nor, if the trustee has the right to and does affirm.

real estate, for it is not necessary to apply the doctrine in order to allow such claims. It is true that the doctrine was made the subject of discussion in the *Chicago Auditorium* case (240 U. S. 581), but this discussion may have been due to the fact that at that time it was not clear that the contractual duty to be proved, although it must be in existence at the date of bankruptcy, need not then be absolute. That anticipatory breach was not later considered the real basis of the decision is shown by the citation of the case in the opinion in *Maynard* v. *Elliott*, in support of the provability of claims not absolutely owing at the date of the petition (p. 275 283 U. S.).

It has been said, however, that "the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke" (*Gardiner* v. *Butler*, 245 U. S. 603, 605). The court below construed the doctrine of *Roth & Appel* to require that the historical distinction attach "not only to realty itself, but to covenants which concern it or rents issuing from it." But the opinion in *Roth & Appel* referred to the historical "diversity" only so far as the claim before the court was considered to be a claim for rent as such, and this Court's reliance thereon in *Gardiner* v. *Butler* was expressly stated to have been "in the absence of statute or express contract". The section of Coke on Littleton (292b) respecting the "diversity", shows that at common law the duty to pay rent was conditional on occupation, but it throws no light on the question of provability in bankruptcy of a claim under a personal covenant which expressly survives eviction and was obviously intended by the parties to permit the landlord to prove a claim thereon in the event of the tenant's bankruptcy. If this type of conditional contractual duty is not provable, it is not because of the historical "diversity", but must be required by some consideration of policy or fairness.

The legislative policy embodied in the Act is one of prompt liquidation for the benefit of creditors and the relief of honest debtors. The allowance of such claims will not delay the administration of the estate, for in every case the indemnity agreement can be valued as soon as reentry is effected, which *ex hypothesi* occurs within the period for filing claims. We are not here concerned with the problem which arises where the event which gives the landlord the election to reenter does not occur within the period for filing claims or may not occur at all. This Court's citation, in its opinion in *Maynard* v. *Elliott*, of *Atkins* v. *Wilcox*, 105 Fed. 595, as a case involving a condition depending upon "an event so fortuitous as to make it uncertain whether liability will ever attach", may forecast the answer. *Atkins* v. *Wilcox* dealt with a claim for future rent (not indemnity) under a lease which contained a covenant giving the landlord the right to reenter in various events none of which had occurred, but the lease did not contain an indemnity covenant surviving reentry.

The argument may be made that if the condition of reentry must be resolved within the six months period for filing claims, then the landlord, by refraining from exercising such right until after the expiration of the period, may avoid the bar of the bankrupt's discharge and thus nullify a basic policy of the statute. But the same objection applies in the case of claims based on any executory contract of the bankrupt; for if the other party, by electing not to treat the bankruptcy as enabling him to file a claim for the entire loss of the contract, could preserve his rights under the contract against the bankrupt with respect to any subsequent breaches despite discharge, the policy of the Act would likewise be defeated. It is believed that in neither case has the creditor the power thus by his own action or non-action to control the provability of his claim. While the *allowability* of the

landlord's claim for the purpose of receiving dividends may depend on the exercise of the right of reentry and the taking of such other steps as may be necessary in order to liquidate the claim, yet none of these steps is essential to the *provability* of the claim; these conditions, being subject to the claimant's control, may be ignored (*Maynard* v. *Elliott*); in any event, the claim will be barred by the discharge.*

From the point of view of fairness, little need be said. The good will and earning power of many corporations now in bankruptcy, especially chain store organizations such as United Cigar Stores, were derived from the possession in more prosperous times of the very leases—covering premises located in strategic points in various cities—that have now been disaffirmed by the trustee in bankruptcy. It is hardly equitable that the other creditors should be in a position, through bankruptcy sales, to take over the enterprises as going concerns, leaving the former landlords to bear the entire economic loss resulting from present conditions.

It may be suggested that it is unfair to the other creditors to permit the landlords to prove, because the indemnity agreements were not considered as liabilities in the balance sheet or credit statements of the bankrupt prior to bankruptcy. But such statements do not usually disclose contractual obligations which have not been breached or liquidated. The same argument would exclude the proof of any contract for the purchase or sale of personal property still executory at the date of bankruptcy.

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* In the case of a bankrupt individual it might happen that after the trustee disaffirmed, both parties to the lease were willing that the relationship continue regardless of the bankruptcy; in such a case, a new promise by the tenant to perform the indemnity agreement would avoid the effect of his discharge (*Zavelo* v. *Reeves*, 227 U. S. 625).

The position in which the bankrupt tenant is placed if claims of this character are not provable in bankruptcy must not be overlooked. This is of the utmost importance to individual bankrupts conducting their business on leased premises. The claim for indemnity, if not provable, will frustrate the policy "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortune." The bankrupt would have lost the use of the property because of the landlord's reentry, and yet would be still burdened by the landlord's claim arising out of the former lease, at the very time he would need freedom from such responsibilities in order to make a fresh start in business.

There can be no reasonable objection to the method of valuation discussed in the petitioners' brief. While for the purposes of judicial valuation the date of a divorced wife's remarriage will not be estimated (*Dunbar* v. *Dunbar*, 190 U. S. 340), the prophecy of economic factors is a commonplace (see opinion below in the *Manhattan Properties* case). There is no merit in the suggestion that since the leases involved in the instant cases do not specify this method of valuation, but provide for indemnity either at the end of the term or in instalments over the balance of the term, to award any present sum as indemnity would change the contract of the parties and give the landlord something for which he did not contract. When future performance is made the subject of judicial valuation the law never aims at an exact equivalent but is satisfied with fair approximation. This was done in the *Chicago Auditorium* case where neither the damages nor the method of computing them was contracted for. The contract in that case provided for a penalty—the bankrupt was to remain

liable for all payments in full after forfeiture—and yet a claim for indemnity on a fair computation was allowed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 505

MANHATTAN PROPERTIES, INC.,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.,

Respondent.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent.

Motion by Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, to Advance and to Consolidate for Joint Hearing.

Consent by Petitioners and by Irving Trust Company, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc., to the Granting of said Motion, and Waiver of Notice thereof.

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October 27, 1933.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC., *Petitioner,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc., *Respondent.*	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation, *Respondent.*	No. 506

MOTION TO ADVANCE AND TO CONSOLIDATE FOR JOINT HEARING

To the Honorables, The Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Comes now, Irving Trust Company, as respondent in No. 506, and respectfully moves the Court to advance the above-entitled causes for joint hearing on an early day convenient to the Court.

Both cases involve claims in bankruptcy for future rent. Irving Trust Company, as Trustee in Bankruptcy and respondent in both cases, has consented to the grant of petitions for writs of certiorari.

Although the two leases differ in language, the Circuit Court of Appeals in its opinions treated the two as governed by one broad rule of law, *i.e.*, the rule that claims upon covenants by the lessee to indemnify the lessor against loss of future rent are not provable claims in bankruptcy.

In the United Cigar Stores estate, the time for filing claims expired February 29, 1933. Landlords' claims for future rent were filed in respect of upwards of 300 different leases, the aggregate claims (exclusive of intercompany claims) amounting to more than $7,000,000.* Of these, over 40, involving in excess of $3,000,000, are now pending before the Referee and the lower Courts.

The same issue has arisen in a number of other estates which are in course of administration in the Southern District of New York, and in many of which the respondent is acting as Trustee in Bankruptcy.

The respondent is further advised that there are numerous other estates in course of administration in other district courts in which similar questions are pending.

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*It has been estimated, however, that there were upwards of 1000 of such leases upon which such claims (exclusive of intercompany claims) might have been filed, the aggregate future rent representing more than $50,000,000.

A final determination of the law on the question of landlords' rights to prove claims in bankruptcy for future rent would clarify the status of many such estates, and a final decision adverse to the claim of the landlords would permit many such estates now to be wound up by composition or sale.

WHEREFORE, respondent prays that the above-entitled causes be set down for joint hearing on an early day convenient to the Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC., *Petitioner,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc., *Respondent.*	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *against* IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation, *Respondent.*	No. 506

CONSENT TO MOTION TO ADVANCE AND TO CONSOLIDATE FOR JOINT HEARING, AND WAIVER OF NOTICE

We consent to the entry of an order granting the motion by Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, to

advance the above-entitled causes and to consolidate them for joint hearing, and hereby waive notice of said motion.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 505.

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST CO., Trustee in Bankruptcy, etc.,
Respondent.

No. 506.

SAMUEL R. BROWN, et al.,
Petitioners,

vs.

IRVING TRUST CO., Trustee in Bankruptcy, etc.,
Respondent.

PETITION FOR REHEARING.

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The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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Supreme Court of the United States

OCTOBER TERM, 1933.

MANHATTAN PROPERTIES, INC., Petitioner, vs. IRVING TRUST CO., Trustee in Bankruptcy, etc., Respondent.	No. 505.
SAMUEL R. BROWN; *et al.*, Petitioners, vs. IRVING TRUST CO., Trustee in Bankruptcy, etc., Respondent.	No. 506.

PETITION FOR REHEARING.

Your petitioners respectfully submit their petition for a rehearing in the above-entitled case.

The decision of this Court was announced on February 5, 1934. On March 2, 1934, Mr. Justice Roberts made an order extending for sixty days the time within which a petition for rehearing might be filed.

Rehearing Is Sought as to Indemnity Clauses Only.

This case involved two questions: First, are damages generally for loss of future rents provable in bankruptcy? Second, may damages be proved upon the indemnity clauses in the leases before the Court?

Petitioners ask for a rehearing on the first question solely with respect to the second question, viz., that as to the indemnity clauses.

The argument in this Court was devoted principally to the first question, and petitioners respectfully suggest the

possibility that this Court in its attention to the more important issue may have misapprehended the less emphasized questions with respect to the indemnity clauses. This view has been fortified by the action of the Court in denying the petition for certiorari in *Schmidt, Trustee* v. *Lloyd Investment Co.* (*In re National Credit Clothing Co.*) on February 13, 1934. It seems difficult to reconcile that result with the decision in this case in so far as it relates to indemnity clauses. The Circuit Court of Appeals of the Second Circuit has already held in *Irving Trust Co.* v. *Possart* (*In re F. & W. Grand 5-10-25 Cent Stores, Inc.*), not yet reported, that:

> "In our opinion neither the Mullings case nor the National Credit case can survive the Manhattan Properties decision by the Supreme Court."

A copy of that opinion is annexed hereto (Exhibit A). The *Possart* case thus regards the *Manhattan Properties* decision as inconsistent with the result reached in the *National Credit*, or *Schmidt*, case.

Argument.

ANTICIPATORY REPUDIATION OF A COVENANT OF INDEMNITY GIVES RISE TO A RIGHT TO DAMAGES. IT IS NOT NECESSARY TO WAIT UNTIL THE DUTY TO INDEMNIFY HAS MATURED, PETITIONERS SUBMIT.

This Court said (78 L. Ed. 463):

> "Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term."

The whole theory of the doctrine of anticipatory breach of contract has been that repudiation prior to fruition of an obligation created an immediate right of action to damages. Certainly that theory has been adopted by this Court

(*Roehm* v. *Horst*, 178 U. S. 1). Certainly, also, this Court has applied that theory to bankruptcy, and held that bankruptcy constituted an anticipatory breach warranting proof in the amount of the present damages (*Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581).

> "In short it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement" (240 U. S. 591).

Indemnity contracts have been no exception to this rule, either generally or in bankruptcy proceedings. In fact, in a leading case present damages for anticipatory breach of a covenant of indemnity were allowed by a court of law purporting to follow the analogy of bankruptcy.

In *Equitable Trust Company* v. *Western Pacific Railway Company*, 244 Fed. 485, present damages of over $38,000,000 were assessed in an action brought upon a contract to indemnify *seriatim* in future years. The District Court's decision was substantially based upon the assumption that the demand would be provable in bankruptcy. L. Hand, *D. J.*, said (244 Fed. 504):

> "This is obviously the result when the indemnitor becomes insolvent, and it would be a strange rule which favored a frank repudiator over an obligor overtaken by bankruptcy."

Judge Hand discussed the theory of present damages for breach of a covenant of indemnity payable in the future as follows (244 Fed. 504):

> "It is quite true that the creditor gets his discounted future installments now in hand, which is something other than getting the full value later, but that is a necessary concession to some present disposition of the controversy, as near a remedial approximation as the circumstances permit. It is true

> also that the indemnitor's obligation is changed from a series in the future to a gross sum down * * *. Damages sound in remedy and are by no means the equivalent of performance. Were it so, specific performance would be the only possible remedy, and even that not literally such."

The Circuit Court of Appeals affirmed Judge Hand's decision, citing two bankruptcy cases as authority for the procedure, of which one was the *Chicago Auditorium* case, 250 Fed. 327, 339. Certiorari was denied by this Court, 246 U. S. 672.

In *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, this Court held that an obligation on a contract of indemnity was provable, although not mature at the time of the bankruptcy. As the Georgia court said in that case, in language quoted by this Court (236 U. S. 554):

> "* * * At the time the petition in bankruptcy was filed the surety had not sustained or incurred any loss or damage on account of the contractors' default. * * * No judgment fixing the amount of the contractors' liability had been obtained. The only information that the surety could have had on the subject was the claim made by the trustees of the school; and it could not know but that the contractors might have a good defense to the claim, or some part of it; * * *"
>
> *Williams* v. *U. S. Fidelity Co.*, 11 Ga. App. 635, 644.

As a matter of fact, the claim of the surety against the bankrupt was not in the same amount as the demand then made by the school trustees. The trustees then demanded $6,876.08 (Transcript, p. 23), but the surety settled *after* the filing of the petition in bankruptcy for $5,475.36 (ibid. p. 11).

Moreover, this Court has cited with approval the case of *Reading Iron Works—Sweatmen's Appeal*, 150 Penna. St. 369, in which a landlord's claim on what was either a covenant of indemnity or its equivalent was held to be provable in an insolvency proceeding. The *Reading Iron Works* case

was cited by this Court in *Wm. Filene Sons Co.* v. *Weed*, 245 U. S. 597, as authority for the proposition that difference between rental value and rent reserved was a "footing" "familiar and fair" for the liquidation of the landlord's damages.

In the *Iron Works* case, the claimant had let the property to the insolvent Iron Works by a lease under the terms of which

> "the lessor reserved the right to terminate the lease for the breach of any condition or covenant but stipulated that his action in so doing should not relieve the tenant from liability in damages for such a breach" (150 Penna. St. 374).

Upon the insolvency of the Iron Works an assignee for the benefit of creditors was appointed, the lease then having more than eight and one-half years to run. The landlord filed a claim for the present value of his loss. An auditor calculated the difference between the rental value for the remainder of the term and the rent reserved at $40,000.

The Court held the claim should be allowed for that difference, as being the present value of the loss, saying (p. 375):

> "This was in effect an election by the lessor not to stand upon the covenant to pay rent during the remainder of the term, but for the benefit of both lessor and lessee to secure from the abandoned premises all that was practicable, holding the tenant liable in damages only for the actual loss sustained. *The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated.* This the auditor has done. *For these damages the lessor has a present cause of action, Lothrop* v. *Reed,* 13 Allen, 294, and for that reason a right to share in the fund. The demand is not for rent,* eo nomine, *for under the agreement the lessor has rented the premises to others. It is for the loss he suffers by reason of the difference of the rentals now obtainable*

* *Lothrop* v. *Reed*, 13 Allen, 294 (Mass. 1866), held that in an insolvency proceeding a creditor upon an executor installment contract might prove for the present value of his loss.

in consequence of the peculiar arrangement and construction of the premises, and the rental agreed upon as an inducement to him to make the investment for the use of the company."*

Other cases holding indemnity covenants maturing in the future provable are *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.), and *In re Twentieth Century Millinery Exchange, Inc.*, 41 Fed. (2d) 237 (S. D. N. Y.)—"neither is provability to be denied because payment was by the terms of the agreement to be made in instalments in the future."

THE FACT THAT THE COVENANT IS BROUGHT INTO PLAY BY REENTRY AFTER THE PETITION IS FILED DOES NOT FORBID PROVABILITY.

In *Maynard* v. *Elliott*, 283 U. S. 273, this Court ruled that the requirement of Section 63(a)(1) that certain claims must be "absolutely owing at the time of the filing of the petition in bankruptcy" did not apply to claims on contract under Section 63(a)(4). In that case the liability held provable was that of an endorser on a note not due until over a year after the adjudication in bankruptcy. The opinion is barren of any suggestion that liability accrued until that time. The amount of possible salvage from the maker, or the maker's estate, was, so far as appears, uncertain.

Here liability was fixed as an immediate and direct result of the bankruptcy, an event contemplated by the indemnity clause, and against which the indemnity clause was intended to afford protection. In *Maynard* v. *Elliott* liability was fixed by the default of the maker, which occurred entirely independent of the bankruptcy and not in fact coincident therewith.

The only possible distinction that we can see is in the reference of this Court to the indemnity covenant as a "new contract." Of course, it was a part of the lease—only its

* The lessor at the special instance of the tenant had made certain peculiar changes in the premises. This, rather than an economic depression, was responsible for the decreased rental value of the premises.

applicability was "new." Previously the liability was inchoate.

But logically should not the duty of the obligor not to become insolvent or bankrupt apply just as much to inchoate liabilities as to those then and there outstanding?

And did not the Court so hold in *Maynard* v. *Elliott?* Is not the liability of an endorser equally inchoate until the maker's default, and therefore equally "new" when that default takes place?

THE DECISION, IN SO FAR AS APPLICABLE TO THE INDEMNITY CLAUSE, HAS ALREADY BEEN APPLIED, AND WILL BE APPLIED, TO GIVE AN UNDESIRABLE TECHNICAL ASPECT TO PROVABILITY, PETITIONERS BELIEVE.

After *Maynard* v. *Elliott,* the Circuit Court of Appeals for the Second Circuit held provable damages for breach of lease covenants other than those relating to rent despite the fact that re-entry occurred (as it generally does) after the filing of the petition. *In re Metropolitan Chain Stores, Inc.,* 66 Fed. (2d) 485. There the Court said in part (p. 486):

> "The claim for restoration of property should be allowed on the more liberal theory expressed in Maynard v. Elliott, 283 U. S. 273. The claim is unlike unaccrued rents, and *the very technical and undesirable rule of having the question turn on whether the claim accrued on the day when the petition was filed or a few days later should be avoided.*"

In its recent decision in the *Possart* case, cited *supra,* the Court, under the compulsion of this decision, has overruled its prior holding and adopted the rule previously characterized as "technical and undesirable." It said:

> "The claim for the cost of restoration is grounded on a provision which authorized the lessee to make alterations in the building on the leased premises so as to use it in conjunction with a building on an adjoining lot, 'provided that upon the termination of this lease the Lessee will repair said demised premises so that the same will, upon such termination, be one complete, fully equipped, independent building as now existing.' As already shown, the lease was not terminated prior to the petition in bankruptcy. Hence

at that critical date the implied covenant of the lessee to restore the premises to their former condition upon termination of the lease had not been broken. In the case of In re Metropolitan Chain Stores, Inc., 66 Fed. (2d) 485, this court held a claim based on a similar covenant to be provable on the theory that the filing of the petition in bankruptcy was an anticipatory breach of such covenant. We think this decision cannot stand in the light of the opinion in the Manhattan Properties case. It is there said:

> 'There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term.'

Although the court was referring specifically to covenants of indemnity against loss of future rents, the principle announced seems equally applicable to the present case. The lessee's duty to restore will become absolute only upon termination of the lease, and this is contingent upon the lessor's election to re-enter in the event that existing money defaults are not made good by the lessee within thirty days after the written notice thereof."

Previously the Courts had found it undesirable to forbid proof of obligations which had not fully matured at the time of the filing of the petition. They endeavored to ameliorate the situation by:

1. The "anticipatory breach" theory, which was eventually approved by this Court in the *Chicago Auditorium* case.

2. The "relation back" theory, illustrated by *In re Desnoyers Shoe Co.*, 227 Fed. 401. Under this theory, when the liability accrued under a "bankruptcy clause," a short time after the filing of the petition, the liability was held to "relate back" to the time of the petition.

Maynard v. *Elliott*, 283 U. S. 273, was thought to eliminate the necessity for these devices. In that case the fact that the creditor had the option of maturing the obligation apparently was deemed to support provability.

PETITIONERS SUBMIT THAT, AS THE CIRCUIT COURT OF APPEALS HAS HELD, THE DECISION IN THIS CASE CANNOT BE RECONCILED WITH THE DENIAL OF CERTIORARI IN THE NATIONAL CREDIT CASE. IF THIS BE TRUE, THE COURT MAY WISH TO REMOVE THE INCONSISTENCY.

The Circuit Court of Appeals of the Second Circuit had held in *In re Mullings Clothing Co.*, 238 Fed. 58 (cert. den. 243 U. S. 635), that when a lease had been breached *before* the filing of the petition in bankruptcy, a landlord's claim for loss of future rent was provable. This case was approved and followed by the Circuit Court of Appeals of the Seventh Circuit in *In re National Credit Clothing Co.*, 66 Fed. (2d) 371. This Court denied certiorari *sub nom. Schmidt* v. *Lloyd Investment Co.* on February 13, 1934, eight days after the decision in this case. In the *National Credit* case there was an indemnity clause.

The only possible distinction between this case and the *National Credit* case lies in the fact that the tenant defaulted prior to the petition. But this distinction seems untenable in the light of *Maynard* v. *Elliott* and the language in the opinion in this case that the "contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term."

If breach is a prerequisite to provability, and if breach cannot take place until the expiration of the original term, it is difficult to see how the fact that the tenant defaulted a few days before the filing of the petition makes the claim provable when the original term extends many years into the future, as it did in the *National Credit* case.

Presumably for this reason the Circuit Court of Appeals of the Second Circuit in the *Possart* case said:

> "In our opinion neither the Mullings case nor the National Credit case can survive the Manhattan Properties decision by the Supreme Court."

If there is inconsistency, as the Circuit Court of Appeals has held and as petitioners believe, it will be corrected some time, and petitioners ask that an opportunity be given in this case.

TO HOLD THE CLAIMS ON THE INDEMNITY COVENANT PROVABLE WOULD NOT BE INCONSISTENT WITH THE DECISION AS TO FUTURE RENT GENERALLY.

As this Court explained in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, *"in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee"* (245 U. S. 605).

In that case—a sequestration suit—proof was allowed upon a lease containing an indemnity clause and not allowed upon a lease not containing such a clause.

As respondents so earnestly emphasized, in the absence of an indemnity clause a landlord has no claim against an evicted solvent tenant.

That principle apparently was the basis of this Court's citation of Co. Litt. 292, b, Sec. 213, in the *Chicago Auditorium* case. That section would have no relation to an indemnity clause.

Accordingly it would be quite consistent to hold that just as a landlord without an indemnity clause may make no claim against an evicted solvent tenant, he may not prove in bankruptcy; but that just as a landlord with an indemnity covenant retains his claim against a solvent tenant, he may prove in bankruptcy.

This result would be consistent with the purpose of the Bankruptcy Act "to relieve the honest debtor from the weight of oppressive indebtedness" (*Maynard* v. *Elliott*, 283 U. S. 273, 277).

If a solvent tenant were not liable, no such relief would be afforded; but the contrary would be true as to indemnity covenants—liability on them would continue to oppress.

Conclusion.

In *Williams* v. *U. S. Fidelity Co.* this Court made susceptibility of liquidation the sole test of the provability of contract claims. There is no difficulty in ascertaining the present value of the indemnity contract—difference between rent reserved and rental value, discounted, is an acceptable standard and one applied in the *Reading Iron Works* case, cited with approval by this Court in the *Filene* case.

The argument in this Court turned largely on the question of the provability of future rents generally. The issue as to the indemnity covenants, as such, was not emphasized. The language of this Court on that subject may not, petitioners submit, be reconciled with other decisions of this Court, and as to the denial of certiorari in the *National Credit* case, the Circuit Court of Appeals has so held in the *Possart* case. Especially it seems inharmonious with this Court's tendency to hold provable liabilities on forward obligations, so as to "relieve the honest debtor."

When the debtor is a corporation the result seems inequitable, as it permits throwing virtually the entire economic loss of the depression suffered by creditors upon the landlords in such cases as the United Cigar bankruptcy, in which creditors with provable claims will receive a 100 per cent. dividend, and a disproportionate amount of the loss upon the landlords in other cases.

A change in the result in so far as the indemnity clauses are concerned would not affect the main principle of the case.

Petitioners therefore ask a rehearing, to be limited to the question of the provability of the indemnity clauses.

Respectfully submitted,

C. DICKERMAN WILLIAMS,
MORRIS J. BRICKER,
Counsel for Petitioners.

April 30, 1934.

Certificate of Counsel.

I certify that this petition is presented in good faith and not for delay.

C. DICKERMAN WILLIAMS.

Exhibit A.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

F. & W. GRAND 5-10-25 CENT STORES, INC.,
Bankrupt.

IRVING TRUST COMPANY, as Trustee,
Petitioner-Appellant,

CORNELIA RIDER POSSART, VIOLA BURDEN, FRANCES R. LEE, VIOLA BURDEN JAMES and GEORGE R. BURDEN,
Appellees,

CORNELIA RIDER POSSART, VIOLA BURDEN, FRANCES R. LEE, VIOLA BURDEN JAMES and GEORGE R. BURDEN,
Claimants-Appellants,

IRVING TRUST COMPANY, as Trustee,
Appellee.

Before:

L. HAND, SWAN and AUGUSTUS N. HAND,
Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York.

From an order which expunged in part and held provable in part a proof of claim filed in the above entitled bankruptcy proceeding, both the creditor-claimants and the trustee in bankruptcy have appealed. Order modified.

GEORGE S. MITTENDORF, for Creditor-Claimants.
FREDERICK H. WOOD, for Trustee in Bankruptcy.

SWAN, *Circuit Judge:*

The creditor-claimants are owners of premises which they had leased to the bankrupt for a term of 30 years commencing May 1, 1931, at an annual rental of $32,000 payable in equal monthly instalments in advance. Upon a petition filed July 14, 1932, their lessee was adjudicated a bankrupt. The lessors' proof of claim involves two distinct items. One is for loss of future rents in the sum of $117,144.24, being the difference (discounted) between the present rental value of the premises for the remainder of the term and the rent reserved in the lease for the same period; this the referee expunged, and his action the district court affirmed. The other, in the sum of $23,000, is for the estimated cost of restoring the premises, which the lessee had altered, to their former condition; this the referee likewise expunged, but the court held it provable on the authority of In re Metropolitan Chain Stores, 66 F. (2d) 485 (C. C. A. 2). Accordingly this item was remitted to the referee for the taking of proof. From the first part of the court's order, the lessors appealed; from the second part, the trustee in bankruptcy.

The claim for loss of future rents is based upon a covenant in the lease which reads, so far as material, as follows:

> "* * * if the Lessee shall abandon the premises, Lessee shall, nevertheless, continue liable for the payment of the rent and the performance of all other covenants and conditions herein contained. And Lessors shall have the right to take possession of, * * * and relet the premises for the account of Lessee, * * * and the Lessee shall be liable to Lessors for whatever deficiency remains * * *."

It is contended by the lessors that the lessee did abandon the premises prior to the filing date of the bankruptcy petition. In March, 1932, equity receivers were appointed for the lessee in the southern district of New York and shortly thereafter an ancillary equity receiver was appointed in the southern district of California, within which the leased

premises were located. The ancillary receiver occupied the premises and paid the stipulated rent up to June 23, 1932, when he moved out, after having notified the lessors that he would pay no more rent. The trustee in bankruptcy disputes the contention that these facts constituted an abandonment by the lessee prior to its bankruptcy, but if we assume arguendo that they did, we cannot see how the lessors' claim is thereby aided. The provision that despite abandonment "the lessee shall continue liable for payment of the rent," cannot be construed as a covenant by the lessee forthwith to pay all rent reserved for the residue of the term; and if it were, it would be an agreement for a penalty and a claim based thereon would not be provable in bankruptcy. Kothe v. Taylor, 280 U. S. 224. Nor can it be construed as a covenant for liquidated damages to be paid on the event of abandonment, and as such controlled by our decision in the recent case of In re Outfitters Operating Realty Co., Inc., decided February 13, 1934. The provision that the lessors may take possession, relet for the lessee's account and hold the lessee for any deficiency is not applicable, for it does not appear that they have taken possession and relet. Moreover, if it be assumed that they did so after the lessee's bankruptcy, it has now been authoritatively determined that a claim based on such a covenant of indemnity is not provable. Manhattan Properties, Inc. v. Irving Trust Co., U. S. Sup. Ct. February 5, 1934.

This decision we think conclusive against the lessors' claim for damages for loss of future rents. They endeavor to escape from it by reason of the ancillary equity receivership. They urge that appointment of the receiver, or at least a vacation of the premises by him, constituted a repudiation of the lease and a breach of its covenants antedating the lessee's bankruptcy, and on this theory they seek to support the provability of the claim upon the authority of In re National Credit Clothing Co., 66 F. (2d) 371 (C. C. A. 7) and In re Mullings Clothing Co., 238 F. 58 (C. C. A. 2). In the former, the lease was disaffirmed by the lessee's assignee for the benefit of creditors, and on the theory that this terminated the lease and constituted a breach of contract

antedating the petition in bankruptcy, the landlord was held to have a provable claim for damages for loss of future rents. The case was cited by the Supreme Court in its recent opinion in Manhattan Properties v. Irving Trust Co., but in a connection which indicates nothing as to approval of it. Nor can we assume approval from the fact that a petition for certiorari was denied on February 13, 1934. In the Mullings case a contract for a lease to commence in futuro was repudiated before the corporate lessee's bankruptcy by the taking of steps to wind up and dissolve the corporation. The decision has been closely limited to its precise facts. In re Metropolitan Chain Stores, 66 F. (2d) 482, 484 (C. C. A. 2). In our opinion, neither the Mullings case nor the National Credit case can survive the Manhattan Properties decision by the Supreme Court. But, however, this may be, neither would control the case at bar. Here there was no termination, nor accepted repudiation, of the lease prior to the lessee's bankruptcy. On June 28, 1932, the lessors served upon the lessee notice of default in respect to taxes and rent, pursuant to a provision of the lease giving the lessors the right, at their option, to re-enter and terminate the lease should a default in the payment of money due the lessors continue for 30 days after written notice thereof was given to the lessee. Thus the lessors themselves recognized the lease as outstanding and the lessee as having the right to make good its defaults during the 30 days following such notice. Before this time expired bankruptcy occurred. Since the lease was not terminated prior to bankruptcy, the claim under consideration falls squarely within the principle that a landlord may not prove in bankruptcy for loss of rents payable in the future, where his claim is founded upon the tenant's covenant to pay rent, or a covenant to indemnify the landlord against loss of rents for the remainder of the term in the event that he re-enters after the tenant's bankruptcy. Manhattan Properties case, supra.

The claim for the cost of restoration is grounded on a provision which authorized the lessee to make alterations in the building on the leased premises so as to use it in conjunction with a building on an adjoining lot, "provided that

upon the termination of this lease the Lessee will repair said demised premises so that the same will, upon such termination, be one complete, fully equipped, independent building as now existing." As already shown, the lease was not terminated prior to the petition in bankruptcy. Hence at that critical date the implied covenant of the lessee to restore the premises to their former condition upon termination of the lease had not been broken. In the case of In re Metropolitan Chain Stores, Inc., 66 Fed. (2d) 485, this court held a claim based on a similar covenant to be provable on the theory that the filing of the petition in bankruptcy was an anticipatory breach of such covenant. We think this decision cannot stand in the light of the opinion in the Manhattan Properties case. It is there said:

> "There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term."

Although the court was referring specifically to covenants of indemnity against loss of future rents, the principle announced seems equally applicable to the present case. The lessee's duty to restore will become absolute only upon termination of the lease, and this is contingent upon the lessor's election to re-enter in the event that existing money defaults are not made good by the lessee within thirty days after the written notice thereof.

The lease also contained an article entitled "Damage and Destruction Insurance" (not printed in the record) which may well have added further contingencies to the duty to restore. Consequently the claim in question was not provable and should have been expunged. McDonnell v. Woods, 298 F. 434 (C. C. A. 1).

That portion of the order from which the lessors appealed is affirmed, and that portion from which the trustee in bankruptcy appealed is reversed, with directions to expunge from the claim the item for the cost of restoration of the premises to their former condition.

SUPREME COURT OF THE UNITED STATES.

Nos. 505 and 506.—OCTOBER TERM, 1933.

505 Manhattan Properties, Inc., Petitioner, *vs.* Irving Trust Company, Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

506 Samuel R. Brown, et al., Petitioners, *vs.* Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 5, 1934.]

Mr. Justice ROBERTS delivered the opinion of the Court.

These cases present the question whether a landlord may prove in bankruptcy for loss of rents payable in the future, where the claim is founded upon the bankrupt's covenant to pay rent, and, in the alternative, upon his breach of a covenant that in event of bankruptcy, the landlord may reenter, and if he does, the tenant will indemnify him against loss of rents for the remainder of the term.

In No. 505 it appears that Oliver A. Olson Co., Inc., was the lessee of premises for a term of nine years and eight months beginning February 1, 1928, and expiring October 1, 1937. Defaults in payment of rent due February and March, 1932, were followed by an involuntary proceeding in which the company was, on March 18, 1932, adjudicated a bankrupt. The total rent reserved for the portion of the term subsequent to bankruptcy was $58,000, and, as the claimant asserted, the present rental value of the leased premises for the remainder of the term was $33,000. The lessor filed its claim, one item being damages for loss of future rentals, which it asked to have liquidated at $25,000, the difference between the rent reserved and the present rental value.

The lease contained a covenant that if the tenant should default in the payment of rent, or abandon the premises, or if they should become vacant, the tenant become insolvent, or make an assignment for the benefit of creditors, or if bankruptcy proceedings should be instituted by or against the tenant, the landlord might without notice reenter the premises; and after obtaining possession, relet as agent for the tenant, for the whole or any part of the term, and from time to time, and:

"The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The referee expunged so much of the claim as sought damages for loss of future rents, holding that it did not constitute a provable debt. The District Court and the Circuit Court of Appeals were of the same opinion.[1]

In No. 506 premises owned by the petitioners were held by the bankrupt under a lease dated June 14, 1920, for a term to expire June 30, 1945. There was a covenant that on default by the lessee, or if it should be adjudicated a bankrupt, the lessor might enter and repossess the premises,

". . . and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

A voluntary petition was filed and an adjudication entered August 29, 1932. November 23, 1932, the trustee disaffirmed the lease, and three days later the lessors took possession and proceeded to collect rents from the occupants of the demised premises;

[1] 66 F. (2d) 470.

and January 13, 1933, they filed a proof of claim which as amended included an item of $4404.40, representing the difference between the rent accrued to the date of reentry and the collections from occupants during that period, and an item of $143,615.80, representing the difference between the alleged rental value for the remainder of the term after reentry and the rent reserved in the lease. Petitioners made application for liquidation of their claim under Sec. 63 (b) of the Bankruptcy Act. The trustee moved to have the claim expunged and disallowed. The referee disallowed both items, and his action was affirmed by the District Court and the Circuit Court of Appeals.[2]

The controversy hinges upon the interpretation of the following sections of the Bankruptcy Act:

"Sec. 63. *Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."[3]

"Section 1 (11). 'Debt' shall include any debt, demand, or claim provable in bankruptcy."[4]

"Section 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts," . . .[5]

A majority of the Circuit Court of Appeals felt bound to follow its earlier decision *In re Roth & Appel*, 181 Fed. 667, which denied a landlord's right to prove a claim for future rents arising under a similar lease. The view there expressed was that the occupation of the land is the consideration for the rent, and if the right to occupy terminates, the obligation to pay ceases; and the covenant to pay rent creates no debt until the time stipulated for payment

[2] 66 F. (2d) 473.
[3] U. S. C. Title 11, § 103.
[4] U. S. C. Title 11, § 1.
[5] U. S. C. Title 11, § 35.

arrives. Since many events may occur which will absolve the tenant from further obligation for rent, the claim is said to be too contingent, both because of the uncertainty at the date of adjudication that the lessor will reenter, and the doubt as to his suffering loss of rent if he should reenter.

In the present case, one of the judges of the Court of Appeals held that *Maynard* v. *Elliott,* 283 U. S. 273, has settled the provability of claims contingent in the sense that no sum is presently payable, thus destroying the principal ground of decision in *re Roth & Appel,* and that the estimation of the present worth of payments to be made in the future is no obstacle to the proof of a claim based upon an anticipatory breach. *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581.

The petitioners say the provability of claims for future rent is a subject on which the lower federal courts have been in disagreement. They argue that a claim for rent is founded upon a lease which is an express contract within the words of Section 63 (a) (4). They rely upon the purpose of the bankruptcy law to bring in all contract creditors and to discharge all debts of the bankrupt, so that he may start afresh unembarrassed by old indebtedness, and point to the hardship to an individual bankrupt of not discharging claims for rent which might well prevent his financial rehabilitation, and the unfairness to the landlord of a corporate bankrupt who, under the decision below, cannot prove upon his lease along with other creditors, but must look solely for redress for loss of future rents to a corporate debtor whom bankruptcy has stripped of all assets.

The respondent asserts a substantial difference between rent and other kinds of indebtedness, and presents equitable considerations thought to weigh in its favor, but especially stresses the legislative history of the bankruptcy laws passed by Congress, and insists that the preponderant construction of them by the courts excludes claims for future rents from the class of provable debts.

The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act. The construction for which the petitioners contend is, as a matter of logic, an admissible one. But that construction is contrary to the great weight of authority as to the effect of similar provisions in earlier Acts, and Section 63 of the present Act.

In England such claims were not provable under the Act of 7 Geo. I, c. 31; *Mayor* v. *Steward*, 4 Burr. 2439; and a discharge could not be pleaded in defense of an action for rent accruing subsequent to bankruptcy. *Boot* v. *Wilson*, 8 East, 311. The landlord's claim for loss of future rent was made provable by the Act of 32 and 33 Vict., c. 71, Sec. 23 (1869), and more explicit provisions to the same effect were embodied in that of 46 and 47 Vict., Ch. 52, Secs. 37 and 55 (1883).

The Act of Congress, approved April 4, 1800,[6] permitted proof of a limited class of contingent claims, but did not mention rents. Apparently the latter were not considered provable debts under that statute. *Hendricks* v. *Judah*, 2 Caines (N. Y.) 25; *Lansing* v. *Prendergast*, 9 Johns. (N. Y.) 127.

The Act of August 19, 1841, Sec. 5, 5 Stat. 440, 444, expressly allowed proof of contingent claims,[7] specifying certain classes and adding a general description of contingent debts, but said nothing about rent. The courts held that the latter was not a provable debt within this section, because neither a present debt nor a contingent claim susceptible of liquidation. *Bosler* v. *Kuhn*, 8 Watts & S. (Pa.) 183; *Stinemets* v. *Ainslie*, 4 Denio (N. Y.) 573; *Savory* v. *Stocking*, 4 Cush. (Mass.) 607.

The Act of March 2, 1867, Sec. 19, 14 Stat. 517, 525, authorized the proof and liquidation of contingent claims, and also proof of a claim for a proportionate part of any rent up to the date of bankruptcy.[8] The courts uniformly held that claims for future rent

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[6] 2 Stat. 19, Sec. 39. " . . . the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss, to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities, as if such money had been due and payable before the time of his or her becoming bankrupt" . . .

"[7] . . . all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti . . ."

[8] " . . . In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor

or for damages for breach of covenant to pay rent were not provable under the act, though differing as to the reason; some holding them not contingent claims within the statutory definition, and others thinking the express permission of proof for rent past due at the date of bankruptcy impliedly excluded claims for rents thereafter falling due. *Ex parte Houghton*, Fed. Cas. 6725; *Ex parte Lake*, Fed. Cas. 7991; *In re Croney*, Fed. Cas. 3411; *In re Commercial Bulletin Co.*, Fed. Cas. 3060; *In re May*, Fed. Cas. 9325; *In re Hufnagel*, Fed. Cas. 6837; *Bailey* v. *Loeb*, Fed. Cas. 739.

In the year 1880 Circuit Judge John Lowell, of Massachusetts, at the suggestion of several mercantile associations, drafted a proposed bankruptcy law, which, after revision, was introduced in Congress, but failed of passage. It contained a section (60) which allowed proof of damages suffered by a landlord by reason of the trustee's rejection of a lease, and another (61) permitting any creditor to compel the trustee to elect to accept or decline any lease, and upon declination the landlord was to have "any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy."[9]

After much agitation by trade associations and commercial bodies, and after prolonged consideration (see *Schall* v. *Camors*, 251 U. S. 239, 250), Congress adopted the Act now in force, that of July 1, 1898.[10] The committee reports do not disclose the origin of the phraseology of Section 63, nor discuss the classes of claims intended to be included. But it is clear that Congress was familiar with analogous sections of the earlier Acts and the court decisions interpreting them, and with the text of the Lowell Bill and

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may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

"Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

[9]The bill in full appears in the Congressional Record, Vol. 14, pp. 43-48.

[10]30 Stat. 544, c. 541.

the English act then in force. In view of the extended consideration and discussion which preceded the passage of the Act, the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra,* pp. 250, 251.

Soon after the passage of the Act several federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under Section 63. *In re Ells,* 98 Fed. 967; *In re Mahler,* 105 Fed. 428; *Atkins* v. *Wilcox,* 105 Fed. 595. Since 1900 the Circuit Courts of Appeals in six circuits, and the District Courts in another, have agreed with these early adjudications. *Slocum* v. *Soliday,* 183 Fed. 410; *McDonnell* v. *Woods,* 298 Fed. 434 (C. C. A. 1); *In re Roth & Appel, supra; In re Mullings Clothing Co.,* 238 Fed. 58; *In re Metropolitan Chain Stores Inc.,* 66 F. (2d) 482 (C. C. A. 2); *Trust Co. of Georgia* v. *Whitehall Holding Co.,* 53 F. (2d) 635; *Orr* v. *Neilly,* 67 F. (2d) 423 (C. C. A. 5); *Wells* v. *Twenty-first Street Realty Co.,* 12 F. (2d) 237 (C. C. A. 6); *Britton* v. *Western Iowa Co.,* 9 F. (2d) 488 (C. C. A. 8); *Colman Co.* v. *Withoft,* 195 Fed. 250 (C. C. A. 9); *Bray* v. *Cobb,* 100 Fed. 270; *In re Hook,* 25 F. (2d) 498. The decisions in the Third Circuit turn upon a special form of lease drawn to take advantage of a local statutory provision, and while establishing a rule differing from that elsewhere recognized, are not inconsistent with it. See *Wilson* v. *Pennsylvania Trust Co.,* 114 Fed. 742; *South Side Trust Co.* v. *Watson,* 200 Fed. 50; *In re H. M. Lasker Co.,* 251 Fed. 53; *Rosenblum* v. *Uber,* 256 Fed. 584. The Court of Appeals of the Seventh Circuit has not discussed the question at length, but at least one of its decisions supports the view that a claim for loss of future rentals may be proved. *In re Chakos,* 24 F. (2d) 482; compare *In re Desnoyers Shoe Co.,* 227 Fed. 401; *In re National Credit Clothing Co.,* 66 F. (2d) 371.

This court has never had occasion to pass upon the precise point. It has not, however, expressed disapproval of the rulings of the great majority of the lower federal courts, and has cited many of their decisions with apparent approbation. See *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581, 589-590; *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597; *Gardiner* v. *Butler & Co.,* 245 U. S. 603, 605; *Maynard* v. *Elliott,* 283 U. S. 273, 278.

In accord with the well-nigh unanimous view of the federal courts reiterated for over thirty years are statements of leading text writers. Collier, Bankruptcy, Vol. 2, p. 1422; Remington, Bankruptcy, Vol. 2, §§ 789, 793; Loveland, Bankruptcy, Vol. 1, § 313.

What of the activities of the Congress while this body of decisions interpreting Section 63a was growing? From 1898 to 1932 the Bankruptcy Act was amended eight times[11] without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *B. & O. Railroad Co.* v. *Baugh*, 149 U. S. 368, 372.

In this situation "only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted." *Maynard* v. *Elliott, supra*, 277. If the rule is to be changed Congress should so declare.

The petitioners call attention to the last clause of Section 74 (a), which is one of the sections added to the Act in 1933:[12] "A claim for future rent shall constitute a provable debt and shall be liquidated under section 63 (b) of this Act." Sections 73 to 76 inclusive were enacted to permit extensions and compositions not theretofore possible. They apply only to individuals. It is highly unlikely that if the quoted sentence had been intended as an amendment of Section 63 (a) it would have been placed in context dealing only with the novel procedure authorized by the new sections. Moreover, the discussion on the floor of the Senate relative to the insertion of the sentence indicates that it was not intended to alter Section 63 (a) as it then stood.[13] The petitioners insist the clause is declaratory of the law, as understood by the Congress; but there is no evidence to support this view, and it is inconsistent with the long standing contrary judicial construction.

It remains to consider the effect of the indemnity covenants in the leases. These do not provide for liquidation of damages (compare *Wm. Filene's Sons Co.* v. *Weed, supra*), nor indeed for any right to damages for breach of the covenant to pay rent.

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[11]Acts of February 5, 1903, c. 487, 32 Stat. 797; June 15, 1906, c. 3333, 34 Stat. 267; June 25, 1910, c. 412, 36 Stat. 838; March 2, 1917, c. 153, 39 Stat. 999; January 7, 1922, c. 22, 42 Stat. 354; May 27, 1926, c. 406, 44 Stat. 662; February 11, 1932, c. 38, 47 Stat. 47.

[12]Act of March 3, 1933, 47 Stat. 1467.

[13]Cong. Rec., Senate, Feb. 24, 1933, pp. 5058-9; Feb. 27, 1933, p. 5278.

In No. 505 the agreement is, in the event of reentry and reletting by the landlord, to pay each month the deficit accruing from the difference between the amount to be paid as rent under the lease and the amount received by the landlord from the premises throughout the residue of the original term; and further, that the overplus, if any, at the expiration of the term, shall be paid to the tenant, unless the landlord, within six months from reentry, release the tenant from all liability under the covenant, which the landlord is authorized to do, thus terminating all rights and liabilities under the agreement of lease.

In No. 506 the stipulation is that upon bankruptcy the landlord may reenter and thereby terminate the lease, and the lessee covenants that, in such case, "it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term" . . .

In both cases the lessor has the choice whether he will terminate the lease. Neither the bankrupt nor the trustee has any such option, except as the trustee may be entitled by law to disclaim. And upon the exercise of the option by the landlord, a new contract, distinct from that involved in the original letting, becomes operative. While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. For here, the landlord does not rely upon the destruction of his contract by the bankruptcy; he initiates a new contract of indemnity by the affirmative step of reentry. And this new contract comes into being not by virtue of the bankruptcy proceeding, but by force of the act of reentry, which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term. There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term. Compare *In re Ells, supra; Slocum* v. *Soliday, supra; In re Roth & Appel, supra.* Such a covenant is not, as petitioners contend, the

equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future. The covenants appearing in the leases in question cannot be made the basis of a proof of debt against the estate.

The judgments are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.